No. 45365-7-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION TWO

In re Personal Restraint of:

MICHAEL ANTHONY LAR,

Petitioner.

Response to Personal Restraint Petition

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I. AUTHORITY FOR PETITIONER'S RESTRAINT

The State of Washington is the Respondent in this matter. Petitioner, Michael Anthony Lar, is restrained by authority of the judgment and sentence of the Lewis County Superior Court under cause number 10-1-00055-5. A copy of the judgment and sentence is attached to this petition as Appendix A.

II. RESPONSE TO PETITIONER'S CLAIMED GROUNDS FOR RELIEF

A. The Petitioners prior federal bank robbery convictions are factually comparable to Robbery in the First Degree and Robbery in the Second Degree therefore, the Petitioner was correctly sentenced under the Persistent Offender Accountability Act to life in prison.

B. The Petitioner received effective assistance from both his appellate counsel and his trial counsel because any deficiency in their representation was not prejudicial.

C. The Kidnapping in the First Degree conviction does not merge with the Attempted Robbery in the First Degree conviction.

D. Lar cannot raise issue with the legal financial obligations imposed by the trial court because there was no objection in the trial court and raising the action at this time is premature.

III. STATEMENT OF THE CASE

The substantive facts of this case are set out in the Court of Appeals unpublished opinion, COA No. 40801-5-II (April 24, 2012).[1] Appendix B, pages 2-11.[2] Lar timely appealed his conviction and sentence, which were affirmed. Appendix B. The Mandate was handed down on September 18, 2012. Appendix B. Lar filed this timely personal restraint petition (PRP) on September 17, 2013.

The State will further supplement the facts and record as necessary in its argument below.

IV. ARGUMENT

A. LAR'S PRIOR FEDERAL CONVICITION FOR BANK ROBBERY ARE FACTUALLY COMPARABLE TO ROBBERY IN THE FIRST DEGREE AND ROBBERY IN THE SECOND DEGREE, BOTH OF WHICH ARE MOST SERIOUS VIOLENT OFFENSES.

Lar argues that his prior convictions for bank robbery in federal court do not count as prior most serious offenses pursuant to *In re Lavery*, 154 Wn.2d 249, 111 P.3d 837 (2005), and therefore, he is improperly sentenced under the Persistent Offender

[1] The Supreme Court denied review, 175 Wn.2d 1003 (2012).

[2] The State is citing to the page numbers as enumerated and paginated in the unpublished opinion. This page numbering does not include the first two pages of Appendix B, the Mandate issued by the Court of Appeals. All citations to Lar's underlying case will be made in this fashion. Also, Lar cites the unpublished opinion for the facts but does not include the entire fact statement from the Court of Appeals decision, the State believes the entire, nine page statement of facts is an accurate and complete statement of the entire case, including the procedural history during the pendency of the case at the trial court level.

Accountability Act (POAA) to life in prison. Petitioner's Brief 3-8. Lar is incorrect. While *Lavery* does state that federal bank robbery, in that case, was not comparable to a most serious offense in Washington, the case does not close the door to the crime being considered a most serious offense if the facts support that finding. Lar's prior federal convictions for bank robbery are factually comparable to Robbery in the First Degree and Robbery in the Second Degree. Lar was properly sentenced under the POAA to a term of life in prison without the possibility of early release.

1. Standard Of Review.

The trial court's interpretation of the persistent offender accountability act is reviewed de novo. *State v. Kippling*, 166 Wn.2d 98, 101, 206 P.3d 322 (2009).

2. Lar Was Properly Sentenced Under The POAA To Life In Prison Without The Possibility Of Early Release Because His Federal Bank Robbery Convictions Are Factually Comparable To Most Serious Offenses in Washington.

A persistent offender shall be sentenced to life in prison without the possibility of early release. RCW 9.94A.570. A person is a persistent offender when:

> (a)(i) Has been convicted in this state of any felony considered a most serious offense; and

> (ii) Has, before the commission of the offense under (a) of this subsection, been convicted as an offender on at least two separate occasions, whether in this state or elsewhere, of felonies that under the laws of this state would be considered most serious offenses and would be included in the offender score under RCW 9.94A.525; provided that of the two or more previous convictions, at least one conviction must have occurred before the commission of any of the other most serious offenses for which the offender was previously convicted; or

RCW 9.94A.030(31)(a). A most serious offense includes "[a]ny felony defined under any law as a class A felony or criminal solicitation of or criminal conspiracy to commit a class A felony." RCW 9.94A.030(21)(a). Lar was convicted of Burglary in the First Degree, Kidnapping in the First Degree and Attempted Robbery in the First Degree, all most serious offenses. RCW 9A.52.020; RCW 9A.40.020; RCW 9A.56.200; RCW 9A.28.020(2); RCW 9.94A.030(21)(a). The State alleged that Lar was a persistent offender and should be sentenced under the POAA. Appendix E.

In a sentencing hearing, "[a] criminal history summary relating to the defendant from the prosecuting authority . . . shall be prima facie evidence of the existence and validity of the convictions listed therein." RCW 9.94A.500. The State must prove a defendant's prior criminal convictions by a preponderance of the evidence. RCW 9.94A.500(1); *State v. Kippling*, 166 Wn.2d 93,

101, 206 P.3d 322 (2009). Illegal or erroneous sentences may be challenged for the first time on appeal. *State v. Ross*, 152 Wn.2d 220, 229, 95 P.3d 1225 (2004)(citations omitted). The remedy for an erroneous sentence is remand for resentencing. *Id.*

When calculating a person's offender score for purposes of sentencing:

> Federal convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. If there is no clearly comparable offense under Washington law or the offense is one that is usually considered subject to exclusive federal jurisdiction, the offense shall be scored as a class C felony equivalent if it was a felony under the relevant federal statute.

RCW 9.94A.525(3). "[F]undamental principles of due process prohibit a criminal defendant from being sentenced on the basis of information which is false, lacks a minimum indicia of reliability or is unsupported in the record." *State v. Ford*, 137 Wn.2d 472, 481, 973 P.2d 452 (1999)(citations omitted).

A foreign conviction is equivalent to a Washington offense if there is either a legal or factual comparability. *Lavery*, 154 Wn.2d 255-58. If the foreign statute is broader than the Washington definition of the particular crime, the sentencing court may look at the defendant's conduct, as evidenced by the indictment or the information, to determine whether the conduct would have violated

the comparable Washington statue. *State v. Duke*, 77 Wn. App. 532, 535, 504 P.2d 1174 (1973). When looking at the facts of the foreign conviction the trial court can consider facts that were stipulated to, admitted, or proven to the finder of fact in the foreign jurisdiction. *State v. Farnsworth*, 133 Wn. App. 1, 18, 130 P.3d 389 (2006), *remanded* 159 Wn.2d 1004, 151 P.3d 976 (2007).

The State alleged Lar had prior convictions for federal bank robbery. Lar's Appendix G, page 8.[3] The State proved that Lar was convicted of two counts of Armed Bank Robbery (18 USC 2113(a) and (d)) in 1985. Lar Appendix C. The State also proved Lar was convicted of one count of Armed Bank Robbery and one count of Bank Robbery (18 USC 2113(a)) in 1997. Lar Appendix D. Lar challenges not that he has these convictions, but that these convictions cannot be classified as most serious offenses. Petitioner's Brief 3-8.[4] While Lar is correct that *Lavery* does hold that the crime of federal bank robbery and the Washington State crime Robbery in the Second Degree are not legally comparable, Lar incorrectly asserts that his federal bank robbery convictions are

[3] The State will cite to documents Lar submitted in his appendices in this matter to avoid duplicate appendices.

[4] Lar also finds fault in his trial and appellate counsel for failing to raise this issue. The State will address that issue in the section below.

not legally or factually comparable to robbery in Washington. Petitioner's Brief 5-7, *citing Lavery*, 154 Wn.2d at 255.

Lavery does not stand for the premise that federal bank robbery and robbery in Washington State can never be comparable offenses. *See Lavery*, 154 Wn.2d 255-58. *Lavery* does hold that the two crimes are not legally comparable because the federal crime of bank robbery is a general intent crime, while robbery in Washington requires the specific intent to steal. *Id.* at 255. In *Lavery* the court did not have the ability to do a factual analysis because Lavery did not admit or stipulate to facts which established specific intent in the federal prosecution. *Id.* at 258. Lar argues he similarly did not admit to or stipulate to facts that establish the specific intent to steal. Petitioner's Brief 7. This is not correct, as part of his pleas Lar admitted to and/or stipulated to facts sufficient for the court to find the specific intent to steal.

On September 24, 1985, Lar entered into a plea agreement wherein he agreed to enter pleas of guilty to two counts of 18 USC 2113(a) and (d) as charged in the Information filed in case number CR85-280D. Lar Appendix C. Count I of the Information read as follows:

> On or about November 17, 1984, at Mount Vernon, within the Western District of Washington, MICHAEL

> ANTHONY LAR, by force, violence and intimidation, did take from the person and presence of bank employees, approximately Three Thousand One Hundred Fifty Dollars ($3,150.00), in money belonging to and in the care, custody, control, management and possession of the Interwest Saving Bank, at 1511 Riverside Drive, Mount Vernon, Washington, the accounts of which were then insured by the Federal Savings and Loan Insurance Corporation; that in committing the offense of robbery hereinabove charged, the defendant MICHAEL ANTHONY LAR assaulted and put in jeopardy the life of the aforementioned bank employees, by the use of a dangerous weapon and device, to wit, a handgun.

Id. Count II of the Information read as follows:

> On or about March 28, 1985, at Arlington, within the Western District of Washington, MICHAEL ANTHONY LAR, by force, violence and intimidation, did take from the person and presence of bank employees, approximately Twenty Five Thousand Nine Hundred Eighty Dollars and Sixty-One Cents ($25,980.61), in money belonging to and in the care, custody, control, management and possession of the Everett Federal Savings and Loan, 535 North Olympic, Arlington, Washington, the accounts of which were then insured by the Federal Savings and Loan Insurance Corporation; that in committing the offense of robbery hereinabove charged, the defendant MICHAEL ANTHONY LAR assaulted and put in jeopardy the life of the aforementioned bank employees, by the use of a dangerous weapon and device, to wit, a handgun.

Id. Lar was sentenced to twenty-five years imprisonment for each offense due to the fact that when he committed each of the two crimes, he assaulted and put in jeopardy the life of another person by the use of a dangerous weapon. *Id.*

On January 31, 1997, Lar entered pleas of guilty to one count of Armed Bank Robbery (18 USC 2113(a) and (d)), and one count of Bank Robbery (18 USC 2113(a)). Lar Appendix D. That plea agreement contained language that Lar was admitting to the facts as set out in the plea agreement. Lar Appendix D. Lar therefore admitted to the following:

> At approximately six o'clock p.m. on May 31st 1996, the defendant, MICHAEL ANTHONY LAR, entered the First Community Bank branch at 5210 Capitol Boulevard in Tumwater, within the Western District of Washington, as bank employees Barbara L. Hutchinson, Jacqueline Barnes and others were preparing to close the bank for the evening. He was wearing sunglasses, a black and blue ski hat with a diamond pattern on it, a red scarf (covering his mouth), a tan hooded sweatshirt with small brown lettering over the left chest area, and dark gloves. H carried a black or dark navy bag, and he displayed a gun that appeared to be a black semi-automatic pistol but was in fact an air pistol.
>
> Once inside the bank, he ordered Barnes and Hutchinson and two other employees to go into the vault and to produce the keys to the safe. The keys were produced and the safe was opened. LAR took from the person and presence of Hutchinson and Barnes a sum of $67,000.00 in U.S. currency belonging to, and in the care, custody, management, and possession of the First Community Bank, 5210 Capitol Boulevard branch, in Tumwater. LAR put the money into his bag. During the robbery, the bank's surveillance camera was activated.

Lar Appendix D. Lar admitted he left the scene in his red Toyota Tercel after ordering the bank employees to leave the bank by the

exit doors as he walked out another set of doors. Lar Appendix D.

Lar also admitted the following as part of his plea deal:

> On Friday, July 12th 1996, at approximately 3:00 o'clock p.m., the defendant, MICHAEL ANTHONY LAR, walked into the Bank One branch located at 4401 East Camelback Road in Phoenix, Arizona. He was wearing a tan-colored straw hat with a wide brim, a white T-shirt with a "Prince " logo and three vertical stripes on the left side, jean shorts, and stocking hose pulled down over his face. He was carrying a green nylon backpack. He approached teller Linda Brenneisen and handed her the bag. Brenneisen recognized him as the same man she had seen through the glass of the main doors, loitering and sitting outside the bank, on a planter ledge, during the previous half-hour. When she had noticed him sitting outside the bank, he had not yet put the stocking hose over his face. As he handed Brenneisen the bag, he told her to "fill it up, put money in here, hurry up and don't set off an alarm." As she was putting money into the bag, he said "Hurry up or I'll get the gun." He did not display a gun, however, and none of the witnesses saw a gun.

Lar Appendix D. Lar left the bank with $11,296.00 he stole from Brenneisen's cash drawers. Lar Appendix D.

To convict a defendant of Robbery in the First Degree the State must prove,

> (1) That on a certain date the defendant took personal property from the person or in the presence of another;
> (2) That the defendant exercised unauthorized control over and intended to deprive the rightful owner of the property;
> (3) That the taking was against the person's will by the defendant's use or threatened use of

immediate force, violence, or fear of injury to that person;
(4) That force or fear was used by the defendant to obtain the property;
(5) And that the defendant either:
(a) Was armed with a deadly weapon during the commission of the acts;
(b) Displayed what appeared to be a firearm or a deadly weapon;
(c) Inflicted bodily injury to another person; or

RCW 9A.56.200. Three of Lar's prior federal bank robberies are factually equivalent to Robbery in the First Degree, the robbery committed on November 17, 1984, the robbery committed on March 28, 1985, and the robbery committed on May 31, 1996. See Lar Appendix C, D. Lar's July 12, 1996 federal bank robbery is factually comparable to Robbery in the Second Degree. See RCW 9A.56.210; RCW 9A.56.190; Lar Appendix D.

Lar argues he did not admit or stipulate to facts that establish the specific intent to steal and his 1985 conviction does not appear to stipulate to any set of facts. Petitioner's Brief 7. This is incorrect. Lar's intent is established by the facts he admitted to, even if Lar did not use the magic words and state specifically that he went into the banks with the specific intent to steal. It is inconceivable to the State that any other intent, or a lack of the specific intent to steal the money, could be found by a court. In the 1985 case Lar plead guilty as charged in the information. Lar

Appendix C. A plea of guilty admits the acts as described in the information. *In re Francis*, 170 Wn.2d 517, 530, 242 P.3d 866 (2010). The information in the 1985 case stated that On November 17, 1984 Lar used a handgun to force from the person of Interwest Savings Bank employees 3,150 dollars. Lar Appendix C. The information also stated that on March 28, 1985 Lar used a handgun to force from the person of Everett Federal Savings and Loan employees 25,980.61 dollars. Lar Appendix C. These facts are sufficient for the trial court to find there was a specific intent to steal, as Lar did steal the money.

The facts admitted to in the 1996 cases similarly established Lar's specific intent to steal the money, as he left the bank after forcing the bank employees to put money in his bag, exited the bank, and left the area. Lar Appendix D. In the May 31, 1996 count Lar brandished what appeared to be a handgun. Lar Appendix D. Also, as further evidence of his intent to steal the money from the bank, Lar admitted to being a serial bank robber. Lar Appendix D. Lar admitted to four other bank robberies, for which the United States, pursuant to the plea agreement, was not charging him with. Lar Appendix D. Under ER 404(b) the wrongdoings admitted to by Lar, robbing four additional banks and stealing approximately

84,342 dollars, would be admissible to show his motive for committing bank robbery was to steal the money. ER 404(b); *State v. Medrano*, 80 Wn. App. 108, 113, 906 P.2d 982 (1995); Lar Appendix D.

Robbery in the First Degree and Robbery in the Second Degree are most serious offenses and would count as "strike" offenses under the POAA. RCW 9.94A.030(30); RCW 9.94A.555; RCW 9.94A.570; RCW 9A.56.190; RCW 9A.56.200; RCW 9A.56.210. The two federal cases the State presented to the trial court each contained convictions for two most serious offenses, as the armed federal bank robberies were factually comparable to Robbery in the First Degree and the unarmed federal bank robbery was factually comparable to Robbery in the Second Degree. The trial court correctly sentenced Lar to life in prison without the possibility of early release under the POAA. This Court should dismiss Lar's petition and affirm the sentence.

B. THE STATE CONCEDES THAT LAR'S APPELLATE AND TRIAL COUNSEL WERE DEFICIENT FOR FAILING TO ARGUE THAT FEDERAL BANK ROBBERY WAS NOT A STRIKE OFFENSE PURSUANT TO *IN RE LAVERY*, BUT LAR SUFFERRED NO PREJUDICE AS A RESULT, THEREFORE, HIS INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM FAILS.

Lar asserts his trial attorney and appellate counsel were ineffective for failing to argue that pursuant to *In re Lavery*, the federal convictions for bank robbery are not most serious offenses and therefore, Lar was not subject to the sentencing provisions of the POAA. Petitioner's Brief 3-8. Lar argues his trial attorney was also ineffective for giving inaccurate legal advice in regards to the length of sentence Lar was facing, which led Lar to reject a favorable plea offer extended by the State. Petitioner's Brief 11-15.

The State concedes that Lar's attorneys' performances were deficient for failing to inform Lar about *Lavery* and argue that Lar's prior federal bank robbery convictions were not most serious offenses. Deficient performance does not render counsel ineffective, as Lar must suffer prejudice as a result of his attorneys' deficient performances. As argued above, Lar's prior convictions are factually comparable to Robbery in the First Degree and Robbery in the Second Degree, both of which are most serious offenses. Further, Lar was not offered a favorable plea deal from

the State agreeing to reduce the charges. Therefore, Lar cannot argue that he rejected a plea deal to his detriment. There was no prejudice suffered by Lar from his attorneys' deficient performances. Lar has not met his burden and his claim of ineffective assistance of counsel fails.

1. Standard Of Review.

A claim of ineffective assistance of counsel brought on a direct appeal confines the reviewing court to the record on appeal and extrinsic evidence outside the trial record will not be considered. *State v. McFarland,* 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) (citations omitted).

2. Lar Cannot Meet His Burden To Show He Was Actually Prejudiced By His Attorneys' Deficient Performance.

To prevail on an ineffective assistance of counsel claim Lar must show that (1) the attorney's performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 674 (1984); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The presumption is that the attorney's conduct was not deficient. *Reichenbach*, 153 Wn.2d at 130, *citing State v. McFarland*, 127 Wn.2d at 335. Deficient performance exists only if

counsel's actions were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. The court must evaluate whether given all the facts and circumstances the assistance given was reasonable. *Id.* at 688. There is a sufficient basis to rebut the presumption that an attorney's conduct is not deficient "where there is no conceivable legitimate tactic explaining counsel's performance." *Reichenbach*, 153 Wn.2d at 130.

If counsel's performance is found to be deficient, then the only remaining question for the reviewing court is whether the defendant was prejudiced. *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003). Prejudice "requires 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *State v. Horton*, 116 Wn. App. at 921-22, *citing Strickland*, 466 U.S. at 694.

The State concedes that Lar's trial counsel and appellate counsel should have cited to *Lavery* and argued that Lar's prior federal convictions for bank robbery were not comparable to most serious offenses in Washington. This deficiency does not render Lar's counsel ineffective. To be ineffective Lar must also be prejudiced by his attorney's deficient performance. Lar cannot meet this burden because, as argued above, Lar was correctly

sentenced under the POAA as his federal convictions were factually comparable to Robbery in the First Degree and Robbery in the Second Degree, most serious offenses in Washington.[5]

3. Lar Cannot Meet His Burden To Show His Trial Attorney Was Ineffective Because There Is No Evidence Of A Favorable Plea Deal Being Offered To Lar.

Lar argues he was prejudiced by his trial attorney's improper legal advice because he did not take what would have been a favorable plea offer extended to him by the State. Petitioner's Brief 11-12. Lar includes a declaration from his trial counsel, Don Blair, stating that the State made a plea offer, and had Mr. Blair known that under *Lavery* Lar's prior convictions were not strike offenses he would have advised Lar to take the State's offer. Petitioner's Brief 11; Lar Appendix E. Mr. Blair also declared that he reasonably expects Lar would have accepted the offer because the main reason they went to trial was because of the persistent offender allegation. Petitioner's Brief 11-12; Lar Appendix E. Lar's declaration similarly states he would have accepted the deal but for the deficient advice from his trial counsel. Petitioner's Brief 12; Lar Appendix F.

[5] The State realizes if this Court does not agree with the State's comparability analysis that Lar's attorneys will be found to be ineffective as he would have suffered prejudice by being improperly sentenced under the POAA.

The State acknowledges that failure of an attorney to properly advise a client about the possible consequences and options available to him or her constitutes ineffective assistance of counsel. *State v. Osborne*, 102 Wn.2d 87, 99, 684 P.2d 683 (1984); *State v. James*, 48 Wn. App. 353, 362, 739 P.2d 1161 (1987). But, Lar presents no evidence of the plea offer from the State, the terms of the alleged offer, a copy of the alleged offer, or what charges the State was allegedly going to reduce. There is no specificity in Mr. Blair's declaration. Lar Appendix E. Further, Lar's assertion that Mr. Blair's declaration supports the statement "the State extended a plea offer to Mr. Lar that involved entering a guilty plea to some, but not all of the offenses" is inaccurate. *See* Petitioner's Brief 11. Mr. Blair's declaration only states that the State extended "a plea offer which involved entering guilty pleas to several crimes, including at least one strike offense." Lar Appendix E. This distinction is important because Lar was charged with three counts, Burglary in the First Degree, Kidnapping in the First Degree, and Attempted Robbery in the First Degree. Appendix C, D. Mr. Blair's declaration does not even state that the State was going to reduce any charges. Lar Appendix E. So, the State asks, what and where is this favorable plea offer extended by the State?

In a personal restraint petition, petitioner bears the burden of showing prejudicial error. *In re Gronquist*, 138 Wn.2d 388, 396, 978 P.2d 1083 (1990); *State v. Brune*, 45 Wn. App. 354, 363, 725 P.2d 454 (1986); *In re Monschke*, 160 Wn. App. 479, 489, 251 P.3d 884 (2010). Bare allegations unsupported to citation to authority, references to the record, or persuasive reasoning cannot sustain this burden of proof. *Brune*, 45 Wn. App. at 363. The petitioner must support the petition with the facts upon which the claim of unlawful restraint rests, and he may not rely solely on conclusory allegations. *In re Personal Restraint of Cook*, 114 Wn.2d 802, 813-14, 792 P.2d 506 (1990); *Monschke*, supra, 160 Wn. App. at 488; RAP 16.7(a)(2)(i). When the allegations are based on matters outside the existing record, the petitioner must demonstrate that he has competent, admissible evidence to establish the facts that entitle him to relief. *Monschke* at 488; *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992). If the petitioner fails to make this threshold showing then he cannot bear his burden of showing prejudicial error. *Monschke*, supra, at 489.

There is no evidence of the State's offer because there was no offer. Appendix F. Mr. Werner's declaration states that Lar was willing to plead guilty as charged to a standard range sentence but

not a sentence under the POAA. Appendix F. Mr. Werner also explains that once he procured documents regarding Lar's federal convictions he believed the only appropriate sentence would be a life sentence under the POAA. Appendix F.

Lar has not shown he suffered any prejudice from Mr. Blair's lack of knowledge of *Lavery*. There was no plea offer tendered by the State for Mr. Blair to give Lar improper advice about or for Lar to reject to his detriment. This Court should dismiss this petition and affirm the sentence.

C. THE KIDNAPPING IN THE FIRST DEGREE CONVICTION WAS NOT INCIDENTAL TO THE ATTEMPTED ROBBERY CONVICTION AND THEREFORE, DOES NOT MERGE.

Lar argues that his Kidnapping in the First Degree conviction merges with his Attempted Robbery in the First Degree conviction because the kidnapping was incidental to the commission of the attempted robbery. Petitioner's Brief 8-11. Lar's analysis is incorrect. The kidnapping of Ms. Weitz was not incidental to Lar's attempted robbery and the counts do not merge.

1. Standard Of Review.

Double jeopardy claims are reviewed de novo. *State v. Lindsay*, 171 Wn. App. 808, 840, 288 P.3d 641 (2012), *review accepted* 177 Wn.2d 1023 (2013).

2. The Kidnapping In The First Degree Was Not Incidental To The Attempted Robbery, Therefore, There Is No Double Jeopardy Issue And The Counts Do Not Merge.

The Fifth Amendment of the United States Constitution and Article One, Section Nine of the Washington State Constitution provide that no person shall be put in jeopardy twice for the same offense. "In Washington, a defendant is subject to double jeopardy if convicted of two or more offenses that are identical in law and in fact." *State v. Taylor*, 90 Wn. App. 312, 318, 950 P.2d 526 (1998), *citing State v. Calle*, 125 Wn.2d 769, 777, 888 P.3d 155 (1995). This analysis is commonly known as the *Blockburger* test. *State v. Marchi*, 158 Wn. App. 823, 829, 243 P.3d 556 (2010), *citing Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180 (1932). The remedy for a double jeopardy violation is vacation of the lesser of the offenses. *Marchi*, 158 Wn. App. at 829.

There are two parts to the double jeopardy analysis. *Marchi*, 158 Wn. App. at 829. "[W]hether the two charged crimes arose from the same act and, if so, whether evidence supporting conviction of one crime was sufficient to support conviction of the

other crime." *Id.*, *citing In re Organge*, 152 Wn.2d 795, 820, 100 P.3d 291 (2004). When a single transaction violates two statutes, the question then becomes, does each require proof of an additional fact? *Blockburger*, 284 U.S. at 304.

If the evidence to prove one crime is also necessary to prove a higher degree crime or another crime, the Court will "consider whether the facts show that the additional crime was incidental to the original crime." *Lindsay*, 171 Wn. App. at 840. If the crime was incidental then an additional conviction is precluded by the merger doctrine. *Id.* When "the offenses have independent purposes or effects" the merger doctrine will not apply and the courts may impose punishment on the separate offenses. *Id.*

The question before this Court in *Lindsay* was whether the Second Degree Kidnapping was incidental to the First Degree Robbery charge. *Id.* at 841-44. Lindsay and Jennifer Holmes went to Lawrence Wilkey's residence and forced themselves into Mr. Wilkey's home. *Id.* at 816. Lindsay and Mr. Wilkey wrestled and Linsday was able to restrain Mr. Wilkey, beating him and tying him up with zip ties. *Id.* Lindsay admitted to using the zip ties on Mr. Wilkey, but stated this was done solely to stop Mr. Wilkey from interefering with Lindsay and Holmes' collection of their belongings.

Id. Lindsay argued that the kidnapping was merely incidental to the robbery and by imposing a sentence for both robbery and kidnapping the court was violating Lindsay's double jeopardy rights. *Id.* at 841.

This Court enumerated five factors in determining if the kidnapping was incidental to the robbery, as set forth in *State v. Korum*, 120 Wn. App. 686, 707, 86 P.3d 166 (2004), *rev'd in part and aff'd in part on other grounds*, 157 Wn.2d 614 (2006):

> (1) the restraint was for the sole purpose of facilitating robbery; (2) the restraint was inherent in the robbery; (3) the victims were not transported from their home; (4) the duration of restraint was not substantially longer than necessary to complete the robbery; and (5) the restraint did not create an independent, significant danger.

Lindsay, 171 Wn. App. at 843.

Lar argues his case is analogous to *Lindsay* and the restraint suffered by Ms. Weitz was the restraint inherent to the robbery itself, and therefore, incidental to the robbery attempt. Petitioner's Brief 10-11. This is incorrect. If Lar had simply come into the bank, ordered Ms. Weitz to retrieve the money, perhaps escorting her from one place within the bank to another to facilitate the taking of the money, then there would be an argument that the kidnapping was incidental to the attempted robbery. That is simply not the case

here. Ms. Weitz went inside the bank, alone, to start the process of opening the bank for the day. Appendix B, page 2. Per bank procedure, there was another employee in the parking lot, Ms. Mejia-Tellez, and Ms. Weitz was in communication with Ms. Mejia – Tellez via cell phone. *Id.* Ms. Weitz went inside the bank through a side door and turned off the alarm. *Id.* Ms. Weitz heard a strange sound, like wind, coming from one of the offices so she went to investigate the sound. *Id.* Ms. Weitz went into the office, turned on the light and was confronted by a man wearing a ski mask and dark clothes. *Id.* The man appeared to be holding a gun and a knife and he struck Ms. Weitz in the back of head with a metal object. *Id.,* pages 2-3. Lar held the gun to the back of Ms. Weitz's head, placed the knife to her throat and threatened to take Ms. Weitz hostage if she screwed the robbery up for him. *Id.* at 3.

Lar then walked Ms. Weitz to the side entrance so she could signal for Ms. Mejia-Tellez to come inside. *Id.* Lar pointed the gun at Ms. Weitz's head and said, "You better not f*ck this up, b*tch or I'll take you with me." *Id.* Lar kidnapped Ms. Weitz with the intent to use her as a shield or a hostage. *See* RCW 9A.40.020(1)(a). A kidnapping for this intent is not incidental to the taking of property from a person, against their will, by the use (or threatened use) of

force, violence, fear, or injury, while armed with a deadly weapon (firearm). *See* RCW 9A.56.200. The use or threatened use of a person as a hostage or human shield creates its own, significant and separate danger from the attempted robbery. Also, a person can attempt to commit robbery without taking hostages or using a human shield in their escape. Lar also kidnapped Ms. Weitz to use her in an attempt to lure Ms. Mejia-Tellez into the bank. This again, is not incidental to the attempted robbery.

The Kidnapping in the First Degree conviction does not merge with the Attempted Robbery in the First Degree conviction. The trial court did not violate Lar's constitutional right to be free from double jeopardy. Therefore, this Court should dismiss Lar's petition.

D. LAR CANNOT RAISE ISSUE WITH THE TRIAL COURT'S IMPOSITION OF DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS BECAUSE HE DID NOT RAISE IT IN THE TRIAL COURT AND THE ISSUE IS NOT RIPE.

Lar argues, for the first time in this personal restraint petition, that the trial court impermissibly assessed the cost of attorney fees and jail fee recoupment without proper findings of his ability to pay. Brief of Appellant 15-16. The alleged error is not a manifest constitutional error and therefore, Lar cannot raise this issue for the

first time in this personal restraint petition as he can show no prejudice. The issue is also not ripe for review.

1. Standard Of Review

A claim of a manifest constitutional error is reviewed de novo. *State v. Edwards*, 171 Wn. App. 379, 387, 294 P.3d 708 (2012).

2. Lar Did Not Object To The Imposition Of Attorney Fees Or The Jail Fee And Cannot Raise The Issue For The First Time In This Personal Restraint Petition Because The Alleged Error Is Not A Manifest Constitutional Error.

The Washington State Supreme Court determined that the imposition of legal financial obligations alone is not enough to implicate constitutional concerns. *State v. Curry*, 118 Wn.2d 911, 917 n.3, 829 P.2d 166 (1992). "[F]ailure to object when the trial court imposed court costs under RCW 10.01.160 amounted to a waiver of the statutory (not constitutional) right to have formal findings entered as to [a defendant's] financial circumstances." *State v. Phillips*, 65 Wn. App. 239, 244, 828 P.2d (1992) (citations omitted). A defendant's failure to object at his sentencing hearing to the court's finding that the defendant has the current or likely future ability to pay legal financial obligations can preclude appellate

review of the sufficiency of the evidence that supports the finding. *State v. Blazina*, 171 Wn. App. 906, 911, 301 P.3d 492 (2013).

There was no objection to the imposition of legal financial obligations at the sentencing hearing. Lar Appendix G, pages 13-14. A timely objection would have made the clearest record on this question. Therefore, the absence of an objection is good cause to refuse to review this question. RAP 2.5(a) (the appellate court may refuse to review any claim of error not raised in the trial court); *State v. Scott,* 110 Wn.2d 682, 685, 757 P.2d 492 (1988) (RAP 2.5(a) reflects a policy encouraging the efficient use of judicial resources and discouraging a late claim that could have been corrected with a timely objection); *State v. Danis*, 64 Wn. App. 814, 822, 826 P.2d 1015, *review denied*, 119 Wn.2d 1015, 833 P.2d 1389 (1992) (refusing to hear challenge to the restitution order when the defendant objected to the restitution amount for the first time on appeal). The only thing in the record that would support Lar's inability in the future to make payments on his legal financial obligations is his POAA sentence.

Another reason to refuse to review the issue at this time is that the superior courts often keep the financial declaration (reviewed at the time public counsel is appointed) under seal and

not accessible to the prosecutor. This type of documentation could have been considered by the trial court in this case. It is unknown if Lar has assets that would enable him to pay his legal financial obligations.

The alleged error is not of constitutional magnitude. Even, if this Court finds the error alleged by Lar is an error of constitutional magnitude, the error is not manifest because there is not a sufficient record for this Court to review the merits of the alleged error. *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009); *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

3. The Imposition Of Legal Financial Obligations Is Not Ripe For Review.

The determination that the defendant either has or will have the ability to pay during initial imposition of court costs at sentencing is clearly somewhat "speculative," the time to examine a defendant's ability to pay is when the government seeks to collect the obligation. *State v. Crook* 146 Wn. App. 24, 27, 189 P.3d 811, *review denied* 165 Wn.2d 1044, 205 P.3d 133 (2008); *State v. Smits*, 152 Wn. App. 514, 523-24, 216 P.3d 1097 (2009). This Court has previously held that the issue is not ripe until the State seeks to collect payment or enforce the judgment. *State v. Lundy*, 176 Wn. App. 96, 108, 308 P.3d 755 (2013). Therefore, because

there is no evidence in the record that the State has sought to collect or enforce the legal financial obligations portion of Lar's sentence, the issue is not ripe for review.

V. CONCLUSION

Lar was properly sentenced to life without the possibility of early release under the POAA. Lar cannot raise the issue regarding his legal financial obligations at this time. This Court should dismiss Lar's personal restraint petition.

RESPECTFULLY submitted this 9th day of May, 2014.

JONATHAN MEYER
Lewis County Prosecuting Attorney

by:_____
SARA I. BEIGH, WSBA 35564
Attorney for the Respondent.

Appendix A

Judgment and Sentence for Lewis County

Superior Court Case No. 10-1-00055-5

Superior Court of Washington
County of Lewis

State of Washington, Plaintiff, vs. **Michael Anthony Lar**, Defendant. SID: WA13944197 DOB: 11-10-1952	**No. 10-1-00055-5** **Felony Judgment and Sentence -- Persistent Offender (FJS)** **[x] Clerk's Action Required, para 2.1, 4.1, 4.3, 5.2 5.3, 5.5 and 5.7**

I. Hearing

1.1 The court conducted a sentencing hearing this date; the defendant, the defendant's lawyer, and the (deputy) prosecuting attorney were present.

II. Findings

2.1 Current Offenses: The defendant is guilty of the following offenses, based upon [ ] guilty plea (date) _____ [x] jury-verdict (date) 03-31-2010 [ ] bench trial (date) _____:

Count	*Crime*	*RCW (w/subsection)*	*Class*	*Date of Crime*
I	Burglary 1st Degree	9A.52.020(1)(a) or (b)	FA	01-25-2010
II	Kidnapping 1st Degree	9A.40.020(1)(a) or (b)	FA	01-25-2010
III	Attempted Robbery 1st Degree	9A.56.200(1)(a) or (b)	FB	01-25-2010

Class: FA (Felony-A), FB (Felony-B), FC (Felony-C)
(If the crime is a drug offense, include the type of drug in the second column.)
[ ] Additional current offenses are attached in Appendix 2.1a.

[x] Count I is a most serious offense and the defendant has been convicted on at least two separate occasions of most serious offense felonies, at least one of which occurred before the commission of the other most serious offense for which the defendant was previously convicted.

[x] Count II is a most serious offense and the defendant has been convicted on at least two separate occasions of most serious offense felonies, at least one of which occurred before the commission of the other most serious offense for which the defendant was previously convicted.

[x] Count III is a most serious offense and the defendant has been convicted on at least two separate occasions of most serious offense felonies, at least one of which occurred before the commission of the other most serious offense for which the defendant was previously convicted.

ORIGINAL 10-9-769-9

The jury returned a special verdict or the court made a special finding with regard to the following:

[ ] The defendant engaged, agreed, offered, attempted, solicited another, or conspired to engage a victim of child rape or child molestation in sexual conduct in return for a fee in the commission of the offense in Count _____. RCW 9.94A.___.

[ ] The offense was predatory as to Count _____. RCW 9.94A.836.

[ ] The victim was under 15 years of age at the time of the offense in Count _____ RCW 9.94A.837.

[ ] The victim was developmentally disabled, mentally disordered, or a frail elder or vulnerable adult at the time of the offense in Count _____. RCW 9.94A.838, 9A.44.010.

[ ] The defendant acted with **sexual motivation** in committing the offense in Count_____. RCW 9.94A.835.

[ ] This case involves **kidnapping** in the first degree, kidnapping in the second degree, or unlawful imprisonment as defined in chapter 9A.40 RCW, where the victim is a minor and the offender is not the minor's parent. RCW 9A.44.130.

[ ] The defendant used a **firearm** in the commission of the offense in Count _____. RCW 9.94A.602, 9.94A.533.

[x] The defendant used a **deadly weapon other than a firearm** in committing the offense in Count I. RCW 9.94A.602, 9.94A.533.

[x] The defendant used a **deadly weapon other than a firearm** in committing the offense in Count II. RCW 9.94A.602, 9.94A.533.

[x] The defendant used a **deadly weapon other than a firearm** in committing the offense in Count III. RCW 9.94A.602, 9.94A.533.

[ ] Count _____ is a **criminal street gang**-related felony offense in which the defendant compensated, threatened, or solicited a **minor** in order to involve that minor in the commission of the offense. Laws of 2008, ch. 276, § 302.

[ ] Count _____ is the crime of **unlawful possession of a firearm**. The defendant was a **criminal street gang** member or associate when the defendant committed the crime. RCW 9.94A.545

[ ] Count _____ involves **attempting to elude** a police vehicle and during the commission of the crime the defendant endangered one or more persons other than the defendant or the pursuing law enforcement officer. Laws of 2008, ch. 219 § 2.

[ ] The defendant committed **[ ] vehicular homicide [ ] vehicular assault** proximately caused by driving a vehicle while under the influence of intoxicating liquor or drug or by operating a vehicle in a reckless manner. The offense is, therefore, deemed a violent offense. RCW 9.94A.030.[ ] The crime(s) charged in Count _____ involve(s) **domestic violence. RCW 10.99.020.**

[ ] Counts _____ encompass the same criminal conduct and count as one crime in determining the offender score (RCW 9.94A.589).

[ ] **Other current convictions listed under different cause numbers used in calculating the offender score are** (list offense and cause number):

	Crime	*Cause Number*	*Court (county & state)*
1.			
2.			

(If the crime is a drug offense, include the type of drug in the second column.)

[ ] Additional current convictions listed under different cause numbers used in calculating the offender score are attached in Appendix 2.1b.

2.2 Criminal History (RCW 9.94A.525):

	Crime	Date of Crime	Date of Sentence	Sentencing Court (County & State)	A or J Adult, Juv.	Type of Crime
1	Armed Bank Robbery	11-17-1984	11-08-1985	United States District Court – Western District of Washington	A	V-F
2	Armed Bank Robbery	03-28-1985	11-08-1985	United States District Court – Western District of Washington	A	V-F
3	Armed Bank Robbery	05-31-1996	01-31-1997	United States District Court – Western District of Washington	A	V-F
4	Bank Robbery	07-12-1996	01-31-1997	United States District Court – Western District of Washington	A	V-F
5						

[ ] Additional criminal history is attached in Appendix 2.2.
[ ] The defendant committed a current offense while on community placement/community custody (adds one point to score). RCW 9.94A.525.
[x] The prior offenses listed as number(s) 1,2 and 3,4 above, or in appendix 2.2, require that the defendant be sentenced as a **Persistent Offender** (RCW 9.94A.570).

[ ] The prior convictions listed as number(s) _____ above, or in appendix 2.2, are one offense for purposes of determining the offender score (RCW 9.94A.525).

[ ] The prior convictions listed as number(s) _____ above, or in appendix 2.2, are not counted as points but as enhancements pursuant to RCW 46.61.520.

2.3 Sentencing Data:

Count No.	Offender Score	Seriousness Level	Standard Range (not including enhancements)	Plus Enhancements*	Total Standard Range (including enhancements)	Maximum Term
I	6	VII	57-75 Months	24 Months (D)	81-99 Months	Life
II	6	X	98-130 Months	24 Months (D)	122-154 Months	Life
III	6	IX	57.75-76.5 Months	12 Months (D)	69.5-88.5 Months	10 Years

* (F) Firearm, (D) Other deadly weapons, (VH) Veh. Hom, see RCW 46.61.520, (SM) Sexual motivation, RCW 9.94A.533(8), (SCF) Sexual conduct with a child for a fee, RCW 9.94A.533(9), (CSG) criminal street gang involving minor, (AE) endangerment while attempting to elude.
[ ] Additional current offense sentencing data is attached in Appendix 2.3.

For violent offenses, most serious offenses, or armed offenders, recommended **sentencing agreements or plea agreements** are [ ] attached [ ] as follows: _____.

2.5 Ability to Pay Legal Financial Obligations. The court has considered the total amount owing, the defendant's past, present, and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that:

[x] The defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

[ ] The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753):

_____.

[ ] The defendant has the present means to pay costs of incarceration. RCW 9.94A.760.

III. Judgment

3.1 The defendant is ***guilty*** of the Counts and Charges listed in Paragraph 2.1 and Appendix 2.1.

3.2 [ ] The court ***dismisses*** Counts _____ in the charging document.

IV. Sentence and Order

It is ordered:

4.1 Confinement. The court sentences the defendant to total confinement as follows:

(a) ***Confinement.*** RCW 9.94A.570. The court sentences the defendant to the following term of total confinement in the custody of the Department of Corrections:

Life without the possibility of early release	on Count	I
Life without the possibility of early release	on Count	II
Life without the possibility of early release	on Count	III

Actual number of months of total confinement ordered is: **life without the possibility of early release**.

All counts shall be served concurrently, except for the portion of those counts for which there is a special finding of firearm or other deadly weapon as set forth above at Section 2.3, and except for the following counts which shall be served consecutively:

_____.

The sentence herein shall run consecutively with the sentence in cause number(s) ____ _____ _____

but concurrently to any other felony cause not referred to in this judgment. RCW 9.94A.589.

Confinement shall commence immediately unless otherwise set forth here:_____.

Court Ordered Treatment: If the defendant is currently undergoing court ordered mental health or chemical dependency treatment, the defendant must notify DOC and must release treatment information to DOC.
RCW 9.94A.562.

(b) ***Credit for Time Served.*** The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.505. The jail shall compute time served unless the credit for time served prior to sentencing is specifically set forth here by the court: 118 days .

4.2 Other: _____

_____

_____

_____

_____.

4.3 Legal Financial Obligations: The defendant shall pay to the clerk of this court:

JASS CODE			
PCV	$ 500.00	Victim assessment	RCW 7.68.035
	$	Domestic Violence assessment	RCW 10.99.080
CRC	$		

Court costs, including RCW 9.94A.760, 9.94A.505, 10.01.160, 10.46.190

Criminal filing fee	$ 200.00	FRC
Witness costs	$	WFR
Sheriff service fees	$ 825.80	SFR/SFS/SFW/WRF
Jury demand fee	$	JFR
Extradition costs	$	EXT
Other	$	

PUB	$ TBD	Fees for court appointed attorney	RCW 9.94A.760
WFR	$	Court appointed defense expert and other defense costs	RCW 9.94A.760
FCM/MTH	$	Fine RCW 9A.20.021; [ ] VUCSA chapter 69.50 RCW, [ ] VUCSA additional fine deferred due to indigency RCW 69.50.430	
CDF/LDI/FCD NTF/SAD/SDI	$	Drug enforcement fund of Lewis County.	RCW 9.94A.760
CLF	$	Crime lab fee [ ] suspended due to indigency	RCW 43.43.690
	$ 100.00	DNA collection fee	RCW 43.43.7541
	$ 1000.00	Other fines or costs for: Jail recoupment fee.	
RTN/RJN	$ TBD	Restitution to: Twin Star Credit Union; 1320 S. Gold St., Centralia, WA 98531	
	$	Restitution to:	
	$	Restitution to: (Name and Address--address may be withheld and provided confidentially to Clerk of the Court's office.)	
	$	***Total***	RCW 9.94A.760

[X] The above total does not include all restitution or other legal financial obligations, which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing:

[X] shall be set by the prosecutor.

[ ] is scheduled for _____ (Date).

[ ] The defendant waives any right to be present at any restitution hearing (sign initials): _____.

[ ] ***Restitution*** Schedule attached.

[ ] Restitution ordered above shall be paid jointly and severally with:

	Name of other defendant	***Cause Number***	(Victim's name)	(Amount-$)
RJN				

[x] The Department of Corrections (DOC) or clerk of the court shall immediately issue a Notice of Payroll Deduction. RCW 9.94A.7602, RCW 9.94A.760(8).

[x] All payments shall be made in accordance with the policies of the clerk of the court and on a schedule established by DOC or the clerk of the court, commencing immediately, unless the court specifically sets forth the rate here: Not less than $25.00 per month commencing 60 days from today's date. RCW 9.94A.760.

The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.160.

4.4 DNA Testing. The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754.

[ ] *HIV Testing.* The defendant shall submit to HIV testing. RCW 70.24.340.

4.5 No Contact: The defendant shall not have contact with

_____ including, but not limited to, personal, verbal, telephonic, written or contact through a third party for _____ years (not to exceed the maximum statutory sentence).

[ ] Domestic Violence No-Contact Order, Antiharassment No-Contact Order, or Sexual Assault Protection Order is filed with this Judgment and Sentence.

4.6 Other: _____

V. Notices and Signatures

5.1 Collateral Attack on Judgment. If you wish to petition or move for collateral attack on this Judgment and Sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, you must do so within one year of the final judgment in this matter, except as provided for in RCW 10.73.100.
RCW 10.73.090.

5.2 Length of Supervision. If you committed your offense prior to July 1, 2000, you shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. If you committed your offense on or after July 1, 2000, the court shall retain jurisdiction over you, for the purpose of your compliance with payment of the legal financial obligations, until you have completely satisfied your obligation, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505(5). The clerk of the court has authority to collect unpaid legal financial obligations at any time while you remain under the jurisdiction of the court for purposes of your legal financial obligations. RCW 9.94A.760(4) and RCW 9.94A.753(4).

5.3 Notice of Income-Withholding Action. If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections (DOC) or the clerk of the court may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A.760 may be taken without further notice. RCW 9.94A.7606.

5.4 Reserved.

5.5 Firearms. You may not own, use or possess any firearm unless your right to do so is restored by a superior court in Washington State, and by a federal court if required. You must immediately surrender any concealed pistol license. (The clerk of the court shall forward a copy of the defendant's driver's license, identicard, or comparable identification to the Department of Licensing along with the date of conviction or commitment.) RCW 9.41.040, 9.41.047.

5.6 *Reserved.*

5.7 Motor Vehicle: If the court found that you used a motor vehicle in the commission of the offense, then the Department of Licensing will revoke your driver's license. The clerk of the court is directed to immediately forward an Abstract of Court Record to the Department of Licensing, which must revoke your driver's license. RCW 46.20.285.

5.8 Other:

_____.

Done in Open Court and in the presence of the defendant this

Date: MAY 27, 2010.

Judge/Print Name: Nelson E Hunt

Deputy Prosecuting Attorney	Attorney for Defendant	Defendant
WSBA No. 33810	WSBA No. 24637	
Print Name: Kjell C. Werner	Print Name: Donald A. Blair	Print Name: Michael Anthony Lar

Voting Rights Statement: I acknowledge that I have lost my right to vote because of this felony conviction. If I am registered to vote, my voter registration will be cancelled. My right to vote may be restored by: a) a certificate of discharge issued by the sentencing court, RCW 9.94A.637; b) a court order issued by the sentencing court restoring the right, RCW 9.92.066; c) a final order of discharge issued by the indeterminate sentence review board, RCW 9.96.050; or d) a certificate of restoration issued by the governor, RCW 9.96.020. Voting before the right is restored is a class C felony, RCW 29A.84.660. Registering to vote before the right is restored is a class C felony, RCW 29A.84.140. Termination of monitoring by DOC does not restore my right to vote.

Defendant's signature: _____

VI. Identification of the Defendant

SID No. WA13944197
(If no SID complete a separate Applicant card (form FD-258) for State Patrol)

Date of Birth 11-10-1952

FBI No. 23253P3

Local ID No. _____

PCN No. _____

Other _____

Alias name, DOB: _____

Race:			**Ethnicity**:	**Sex**:
[ ] Asian/Pacific Islander	[ ] Black/African-American	[x] Caucasian	[ ] Hispanic	[x] Male
[ ] Native American	[ ] Other: _____		[x] Non-Hispanic	[ ] Female

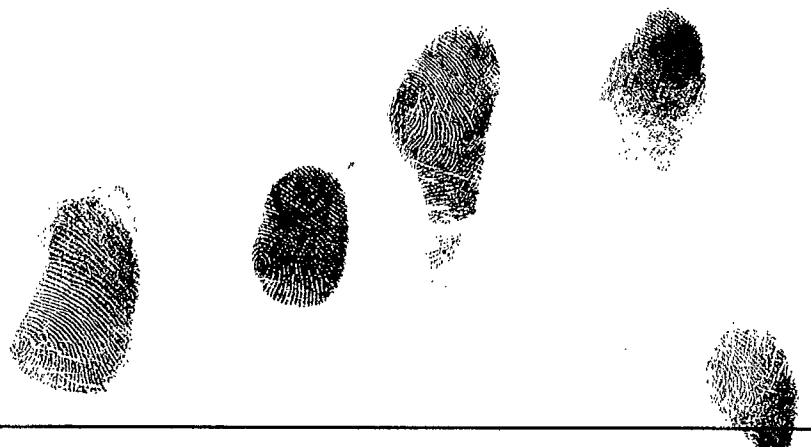
Fingerprints: I attest that I saw the defendant who appeared in court affix his or her fingerprints and signature on this document.

Clerk of the Court, Deputy Clerk, _____
Dated: 5/27/10

The defendant's name: Michael Anthony Lar

The defendant's signature: _____

Left four fingers taken simultaneously	Left Thumb	Right Thumb	Right four fingers taken simultaneously



Appendix B

Mandate and Unpublished Opinion

COA No. 40801-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v MICHAEL ANTHONY LAR, Appellant	No 40801-5-II MANDATE Lewis County Cause No 10-1-00055-5

The State of Washington to The Superior Court of the State of Washington in and for Lewis County

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division II, filed on April 24, 2012 became the decision terminating review of this court of the above entitled case on September 5, 2012 Accordingly, this cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion Costs have been awarded in the following amount

Judgment Creditor, State of Washington, $50 00
Judgment Creditor, Appellate Indigent Defense Fund, $5824 69
Judgment Debtor, Michael Anthony Lar, $5874 69

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Tacoma, this 18th day of September, 2012

Clerk of the Court of Appeals,
State of Washington, Div II

John A Hays
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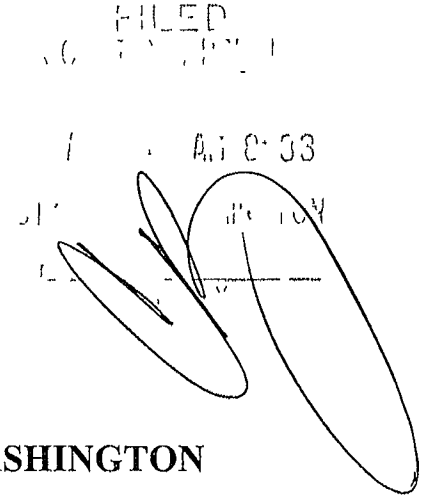
Longview, WA, 98632-3714

Sara I Beigh
Lewis County Prosecutors Office
345 W Main St Fl 2
Chehalis, WA, 98532-4802

Hon Nelson E Hunt
Lewis County Superior Court Judge
360 NW North St
Chehalis, WA 98532



IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v MICHAEL ANTHONY LAR, Appellant	No 40801-5-II UNPUBLISHED OPINION

HUNT, J — Michael Anthony Lar appeals his jury convictions for first degree burglary, first degree kidnapping, and first degree attempted robbery He argues that (1) the trial court violated his state and federal constitutional rights when it refused to suppress evidence obtained after police arrested him without a warrant in a "high risk"[1] stop, (2) he received ineffective assistance when defense counsel failed to file a timely motion to suppress evidence flowing from Lar's allegedly unlawful arrest and from his allegedly coerced statements, (3) the trial court violated his right to a fair and impartial jury trial when it denied his motion to excuse a juror who had failed to disclose that he was acquainted with a State witness, and (4) the trial court erred in sentencing him to life in prison under the Persistent Offender Accountability Act (POAA)[2]

---

[1] Verbatim Report of Proceedings (VRP) (March 26, 2010) at 136

[2] Chapter 9 94A RCW

because the State did not produce substantial evidence that he had two prior bank robbery convictions In his Statement of Additional Grounds (SAG), Lar asserts that the trial court erred during voir dire by conducting an "inadequate inquiry" into the possible prejudicial effect that adverse pretrial publicity might have had on the jury pool SAG at 1 We affirm

FACTS

I BURGLARY, KIDNAPPING, AND ATTEMPTED ROBBERY

A Credit Union

Around 6 30 AM on January 25, 2010, Holly Weitz arrived at the Twin Star Credit Union in Centralia to begin her opening shift as a bank teller When Weitz approached the bank's parking lot, she saw fellow employee Esperanza Mejia-Tellez waiting in her vehicle The credit union's opening procedures required Weitz to call Mejia-Tellez on her cell phone and then to enter the building, turn off the security system, turn on the bank's lights, and eventually tell Mejia-Tellez by cell phone that she could safely enter the building

After Weitz parked her car, she established a cell phone connection with Mejia-Tellez, entered the credit union's side entrance, and disarmed the alarm She heard a noise that sounded like "wind" coming from the assistant manager's office Verbatim Reports of Proceedings (VRP) (March 25, 2010) at 23 She went to investigate, pushed open the door to the office, turned on the light, and saw a man wearing dark clothing with a ski mask over his face crouched in the corner According to Weitz, the man was about 6'3" tall and approximately 60 years old Although the mask covered most of his face, Weitz noticed his unusually blue eyes and white stubble on his upper lip He appeared to be holding a handgun in his right hand and a knife in his left hand The man, later identified as Michael Anthony Lar, rushed toward Weitz and hit her on

the back of the head with a metal object, which she believed was his handgun Weitz screamed and dropped her cell phone Lar held his gun to the back of her head, placed his knife on her throat, told her not to touch her cell phone, and threatened to take her hostage if she "screwed" anything up for him VRP (March 25, 2010) at 26

Weitz explained that she needed to talk to Mejia-Tellez, who otherwise would immediately call the police Lar handed Weitz her cell phone Weitz tried to call Mejia-Tellez four or five times, but she was so upset that she misdialed and was unable to get a call through Lar took Weitz to the side entrance of the building and told her to stick her head outside and to wave for Mejia-Tellez to come inside, while pointing his gun at Weitz's head and telling her, "[Y]ou better not [f*ck] this up, [b*tch or] I'll take you with me " VRP (March 25, 2010) at 29 Weitz opened the side door and waived her cell phone at Mejia-Tellez, beckoning her inside

Mejia-Tellez did not respond because she had already called the police Weitz noticed Centralia Police Officer Neil Hoium with a gun, approaching on the right side of the credit union Holding her thumb and index finger in the shape of a "gun," Weitz mouthed silently to Hoium that a male intruder inside had a gun VRP (March 25, 2010) at 111 Hoium grabbed Weitz's arm and pulled her out of the doorway According to Hoium, a male figure inside the credit union appeared out of the shadows holding what appeared to be a 45 caliber handgun Hoium fired two shots at the man, who disappeared from view

B Arrest

About five minutes later, officers established a perimeter around the credit union, they then spent several hours trying to establish communication with Lar, whom they believed was inside Eventually two SWAT teams stormed the building, but Lar was not there Police officers

searched the bank and the surrounding area with a K-9 unit, which found no trace of the suspect and no additional evidence Processing the scene inside the credit union, detectives found a broken window in the assistant manager's office, blood on the window frame and wall, and glass shards with what appeared to be blood on them below the window

Later that same evening, Kimberly Ronnell observed a man walking down the street near her house a couple blocks from the credit union He was "average" size with blonde or grayish hair, wearing a dark jacket and jeans, limping, holding his side, and looking "groggy" VRP (March 26, 2010) at 68 As Ronnell pulled into her front driveway, the man asked her to call him a taxi so he could go to Olympia, she did A few minutes later, taxi driver Joey McKnight picked up Lar in front of Ronnell's house Lar was wearing jeans and a coat and carrying a gray shoulder bag, he insisted on sitting in the back seat According to McKnight, Lar wore black gloves, which he did not remove, even when paying for his fare Lar told McKnight that he had hurt his arm in a car accident in Chehalis, but he did not ask to stop for treatment, even when McKnight picked up another passenger at the Centralia hospital on the way to Olympia After delivering Lar to "Peppers,"[3] a bar in downtown Olympia, McKnight noticed that Lar was carrying a pair of bloody jeans and duct tape, McKnight called the Centralia Police Department, to which he had provided tips, and provided a description of Lar

Around 8 45 PM, Lar walked into the Phoenix Inn, four blocks from Peppers, and asked the front desk attendant, Emma Alexander, to call him a taxi to go to Seattle or as "far north as possible" VRP (March 26, 2010) at 82 According to Alexander, Lar was wearing black workout pants, leather shoes, a dark navy-blue jacket, and a black glove on his right hand He

[3] VRP (March 26, 2010) at 77

had blood splotches on his clothing, a pair of denim jeans wrapped around his right arm, and a roll of duct tape Lar told Alexander that he had injured his arm in a car accident in Chehalis Although Lar appeared to be in extreme pain, he repeatedly told Alexander not to call paramedics to assist him because he did not have health insurance Alexander arranged for a taxi to take Lar to Sea-Tac Airport Around 9 05 PM, a white taxi with a red top picked Lar up at the inn Lar conversed with the taxi driver for about five minutes before entering the cab

Another Phoenix Inn employee, Crystal Schultz, called the Olympia Police Department and provided a description of Lar and the taxi At approximately 9 15 PM, six or seven blocks from the inn, Olympia Police Officer Jacob Brown spotted a taxi matching this description, drove behind the taxi, and noticed a white male with "lightish or gray hair" crouched in the back seat VRP (March 26, 2010) at 135 Earlier in the day, the Olympia Police Department had briefed Brown about the attempted Centralia credit union robbery, and dispatch had informed him that they suspected the man Schultz had reported to have been involved Brown called for backup

The Olympia police shut down the street, conducted a "high risk" stop, pulled Lar out of the taxi at gunpoint, and put him face down on the sidewalk VRP (March 26, 2010) at 136 According to Brown, Olympia police "detained" Lar and put him in handcuffs VRP (March 26, 2010) at 143 Centralia police officers, also present, (1) observed that Lar had "blue"[4] eyes, that he was wearing "layers,"[5] including black sweats and a jacket, that he appeared to have wounded

[4] VRP (March 26, 2010) at 44

[5] VRP (March 26, 2010) at 46

his arm, and that he was holding duct tape and a pair of jeans, (2) "arrested" Lar, and (3) took him to the Olympia police station, where police confiscated several layers of his clothing and photographed his injuries Because Lar had gunshot wounds to his arm and to his hip, they had him transported to the hospital

C Investigation

Lar spent several days hospitalized under heavy sedation, restrained to his bed As he drifted in and out of consciousness that first evening, Centralia police officers discussed with him aspects of the attempted robbery without first reading him *Miranda*[6] rights At one point, Lar told Detective Carl Buster that he did not want to talk, and Buster stopped discussing the case with Lar Later, however, according to Officer Gary Byrnes, before the officers engaged in any overt questioning, Lar volunteered the following information (1) he was "going to prison for the rest of his life"[7], (2) he was not mad at the officer who had shot him, and (3) if the girl at the credit union had done what he had told her, none of this would have happened

Early the next morning, at approximately 1 00 AM, Byrnes read Lar his *Miranda* rights for the first time at the hospital According to Byrnes, Lar indicated that he understood his rights, said that he did not want any attorneys to visit him, reiterated that he was not angry at the officer who had shot him, described how he had carried out the attempted robbery and how he had eluded the police, and explained that he had hidden in the bushes near at the north end of the credit union until around 6 00 PM, when the police left Lar also explained that he then had buried his gun across the street from the credit union, had looked for but could not find his lost

[6] *Miranda v Arizona*, 384 U S 436, 86 S Ct 1602, 16 L Ed 2d 694 (1966)

[7] VRP (March 10, 2010) at 12

car keys, and had caught a taxi to Olympia Lar drifted in and out of sleep while he had this conversation with Byrnes, repeatedly pushing an intravenous pain medication button

Later that day, Centralia police officers returned to the credit union to look for more evidence Using canine dogs to track Lar's scent, they discovered a black ski mask and an electronic key fob for a Cadillac in the bushes On the credit union's exterior wall, they found a red spot that appeared to be blood, they also found a straw of grass saturated in blood and two glass shards Later tests revealed that the blood on one of the glass shards matched Lar's DNA profile

Buried in the bushes on the property across the street from the credit union, officers found a knife with a three-inch blade and a black BB gun that looked like a pistol Three or four blocks away, officers found a white Cadillac with Montana plates registered to Lar's wife, its doors and lights activated when they pressed a button on the key fob that they had found in the bushes outside the credit union After obtaining a search warrant, the police found Lar's wallet inside the Cadillac

II PROCEDURE

The State charged Lar with first degree burglary, first degree kidnapping, and attempted first degree robbery, with deadly weapon sentence enhancements The State also notified Lar that it would request life in prison without parole under the Persistent Offender Accountability Act ("POAA") [8]

[8] RCW 9 94A 555

A Pretrial Motions

Following a CrR 3 5 hearing to determine the admissibility of Lar's statements to the police officers at the hospital, the trial court ruled that Lar had been "in custody"[9] at the hospital and suppressed all of the statements that Lar had made to the officers because (1) Lar's heavy medication rendered his pre-*Miranda* statements involuntary, (2) after the police read him his *Miranda* rights, Lar did not knowingly and voluntarily waive them, and (3) the officers violated Lar's Fifth Amendment[10] rights when they continued questioning him after he invoked his right to remain silent during questioning about a different offense [11]

Lar did not move to suppress the BB gun and knife But he did move to suppress his medical records, which police officers had seized from the hospital without a warrant The court granted the motion Lar later moved to suppress all evidence that the police had obtained following his warrantless detention, arrest, and subsequent search Lar argued that the police lacked probable cause or reasonable suspicion to stop his taxi and, therefore, the State needed to show an exception to the warrant requirement before any evidence flowing from his detention and arrest was admissible The trial court refused to hear this untimely motion because Lar had

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[9] Clerk's Papers (CP) at 62

[10] U S CONST amend V

[11] At the hospital around "mid-day" on January 26, a detective from Ellensburg had read Lar his *Miranda* rights and then had spoken to Lar about an unrelated crime, apparently, Lar had invoked his right to remain silent CP at 61 Centralia police officers then questioned Lar about the Centralia bank robbery, believing that Lar had not, however, invoked his right to remain silent about the attempted credit union robbery that they were investigating

not filed it by the time of the omnibus hearing [12] When the State rested its case, Lar renewed his motion to suppress this evidence, and the trial court again denied it

On the eve of trial, Lar moved for a continuance and waived his speedy trial rights after learning that the Centralia Police Department had allegedly issued a press release to newspapers, radio stations, and television stations in Lewis County and surrounding areas The media reported that DNA evidence linked Lar to the Centralia credit union robbery and to an earlier bank robbery at the same credit union, and that he might have committed seven other bank robberies in western states Lar expressed concern that this information could affect the jurors in his trial The trial court denied Lar's motion, noting that (1) it was "totally speculative" about what information would be available to prospective jurors and whether it would affect any juror's ability to be fair and impartial in his trial, and (2) the parties could deal with the publicity during voir dire VRP (March 23, 2010) at 7 The trial court asked the parties to remind it to inquire about the publicity during voir dire if it forgot to ask [13]

B Trial

During voir dire, the trial court apparently read the State's witness list and asked the jurors if they were acquainted with any of the State's witnesses Juror 32 initially indicated that he did not know any of the State's witnesses, and the parties accepted him as the eighth member

[12] The trial court also commented that the motion was "generic" and that Lar could have submitted it at an earlier date VRP (March 24, 2010) at 20

[13] The parties did not designate a verbatim report of the jury selection proceedings as part of the record on appeal *See* VRP (March 24, 2010) at 8 Nevertheless, nothing in the record suggests that the trial court failed to question the jury pool about the pretrial publicity as planned The record also shows that the trial court instructed the empanelled jury not to read or to listen to any publicity about the case *See* VRP (March 24, 2010) at 12

of Lar's jury panel According to the clerk's notes, Lar exercised four of his six peremptory challenges during voir dire The parties accepted twelve jurors and two alternates for the jury panel

During noon recess on the second day of trial, Lar's counsel observed juror 32 greet a person whom counsel realized was State witness Joey McKnight, the taxi driver who had transported Lar from Centralia to Olympia Counsel immediately notified the trial court, and the parties questioned the juror out of the presence of the other jurors Juror 32 testified that (1) McKnight was "the boyfriend of a former girlfriend of [juror 32's] stepson," (2) he did not know McKnight very well, (3) he (juror 32) had originally indicated that he did not know any of the State's witnesses because he did not know McKnight's last name, (4) he had not spoken to McKnight in over six months, and (5) he would not give McKnight's testimony more weight than other witnesses' testimonies VRP (March 25, 2010) at 57 Lar moved to excuse juror 32, arguing that he would have used one of his two remaining peremptory challenges to strike juror 32 during voir dire had he known about the juror's acquaintance with McKnight Ruling that juror 32 had sufficiently shown that he could be fair and impartial, the trial court denied Lar's motion

C Verdict and Sentencing

The jury found Lar guilty of all three charges, committed while armed with a deadly weapon At sentencing, the State presented two certified copies of Lar's 1985 and 1997 federal judgment and sentences and asked the trial court to sentence Lar to life in prison without the possibility of parole under the POAA Jennifer Tien authenticated the documents, testifying that she was a federal probation officer familiar with Lar's criminal record and had supervised him

following his earlier federal convictions, beginning in October 2008 The 1985 judgment and sentence showed that the federal court had sentenced a "Michael Anthony Lar" on two counts of armed bank robbery; the 1997 judgment and sentences on two separate cases similarly showed that the federal court had sentenced a "Michael Anthony Lar" on one count of armed bank robbery and one amended count of armed bank robbery.[14]

Lar objected to admission of these prior federal judgment and sentences, arguing that the State had not provided a sufficient foundation to show that he had committed these crimes Overruling Lar's objection, the trial court admitted the documents as court records and sentenced Lar to life in prison without the possibility of parole under the POAA Lar appeals his convictions and sentence

ANALYSIS

I PRETRIAL PUBLICITY

In his SAG, Lar contends that (1) during voir dire, the trial court erred by conducting an "inadequate inquiry" into the prospective jury pool's familiarity with adverse pretrial publicity from the local news and radio stations the day before jury selection, and (2) the "probability of prejudice" was so great that it requires reversal of his conviction SAG at 3 (quoting *United States v Smith*, 790 F 2d 789, 795 (9th Cir 1986)) We disagree

Trial courts have broad discretion to determine how best to conduct jury voir dire *State v Davis*, 141 Wn 2d 798, 826, 10 P 3d 977 (2000) The trial court's exercise of discretion is limited "*only when the record reveals* that the [trial] court abused its discretion and thus

[14] The State appears to have amended this conviction in 2001 to "armed bank robbery" Sentencing Ex 2, *see also* VRP (May 26-27, 2010) at 12

prejudiced the defendant's right to a fair trial by an impartial jury" *Davis*, 141 Wn 2d at 826 (emphasis added) Absent an abuse of discretion and a showing that the rights of an accused have been substantially prejudiced, we will not disturb on appeal a trial court's ruling on the scope and content of voir dire *Davis*, 141 Wn 2d at 826 Where trial-related publicity creates a probability of prejudice, the defendant is denied due process of law if the trial court does not take sufficient steps to ensure a fair trial *State v Wixon*, 30 Wn App 63, 67, 631 P 2d 1033, *review denied*, 96 Wn 2d 1012 (1981) [15] Such is not the case here

Lar did not designate a transcript of voir dire as part of the record on appeal [16] Thus, we cannot review specific questions that the trial court and counsel asked prospective jurors about their exposure to Lar's pretrial publicity The record that we do have before us, however, shows that (1) the trial court expressly planned to question the jury pool about their familiarity with the publicity, (2) to assure that this inquiry happened, the trial court specifically asked both counsel to remind it to ask such questions if it forgot, (3) Lar was represented by counsel at the pretrial hearing where the publicity was discussed and during jury selection and, therefore, presumably followed through with this voir dire component[17], and (4) at the end of voir dire, Lar had two

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[15] We found no probability of prejudice where (1) Wixon's counsel had the opportunity to make "general inquiries" of the prospective jurors about their familiarity with the pretrial publicity, (2) counsel chose not to do so, and (3) he did not exercise all of his peremptory challenges *Wixon*, 30 Wn App at 70-71

[16] RAP 9 2 (b) provides "A party should arrange for the transcription of all those portions of the verbatim report of proceedings necessary to present the issues raised on review"

[17] Lar does not assert that his trial counsel rendered ineffective assistance by failing to make sure that the trial court asked the jury venire about pretrial publicity Moreover, "[t]here is a strong presumption that [trial] counsel's performance was reasonable" *State v Kyllo*, 166 Wn 2d 856, 862, 215 P 3d 177 (2009), *see also State v Grier*, 171 Wn 2d 17, 33, 246 P 3d 1260 (2011)

unused peremptory challenges, which he could have used to excuse any remaining jurors that he believed might have been tainted by pretrial publicity [18] That Lar chose not to exercise these remaining peremptory challenges suggests that he was satisfied of the jury's freedom from such pretrial publicity taint

Lar is not required to include in his SAG citations to the record Nevertheless, "the appellate court is not obligated to search the record in support of claims made in a defendant/appellant's statement of additional grounds for review" RAP 10 10(c) The record before us contains no support for Lar's assertions that the trial court failed to inquire about potential jurors' exposure to adverse pretrial publicity and that such failure prejudiced him On the contrary, as we set forth above, the record supports an opposite conclusion

II Motion To Excuse Juror

Lar next argues that, in denying his motion to excuse juror 32 on the second day of trial, the trial court violated his right to a fair and impartial jury, guaranteed by the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution He contends that (1) juror 32 failed to disclose during voir dire his acquaintance with a State witness, (2) had he (Lar) known this fact during voir dire, he would have used one of his remaining peremptory challenges to remove juror 32, and (3) because there were two alternates available in the jury box when the trial court denied his motion, excusing juror 32 would not have delayed the trial The State responds that the juror sufficiently demonstrated that he could

[18] We note that Lar does not assert nor does the record suggest that the trial court refused to excuse for cause any juror exposed to and affected by the pretrial publicity

be fair and impartial in trying Lar's case and, therefore, the trial court did not abuse its discretion in denying Lar's motion We agree with the State

A Standard of Review

We review for abuse of discretion a trial court's decision about whether to excuse a juror *State v Depaz*, 165 Wn 2d 842, 852, 204 P 3d 217 (2009) A trial court abuses its discretion when it bases its decision on untenable grounds or reasons *Depaz*, 165 Wn 2d at 852 The question for the trial court is whether the challenged juror can set aside preconceived ideas and try the case fairly and impartially *Ottis v Stevenson-Carson Sch Dist* No 303, 61 Wn App 747, 752-53, 812 P 2d 133 (1991) The trial court has authority to find facts before deciding to dismiss a juror as unfit under RCW 2 36 110, the trial court also weighs the credibility of the challenged juror based on its observations *State v Jorden*, 103 Wn App 221, 229, 11 P 3d 866 (2000), *review denied*, 143 Wn 2d 1015 (2001) We defer to the trial court's factual determinations in such matters *Jorden*, 103 Wn App at 229

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee a defendant the right to a trial by an impartial jury *State v Brett*, 126 Wn 2d 136, 157, 892 P 2d 29 (1995) A defendant is entitled to a fair trial, not a perfect one *McDonough Power Equip , Inc v Greenwood*, 464 U S 548, 553, 104 S Ct 845, 78 L Ed 2d 663 (1984)

> To invalidate the result of a trial because of a juror's mistaken, though honest response to a [voir dire] question, is to insist on something closer to perfection than our judicial system can be expected to give.

McDonough, 464 U S at 555 "The motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial "

McDonough, 464 U S at 556 A juror's failure to speak during voir dire about a material fact *can* also amount to juror misconduct *Allyn v Boe*, 87 Wn App 722, 729, 943 P 2d 364 (1997) But there is no such misconduct alleged or shown here

B Juror 32's Ability To Try Case Fairly and Impartially

Because Lar did not arrange for transcription of voir dire, we do not have that part of the record before us Nevertheless, it appears that, as Lar asserts, (1) during voir dire, the trial court asked the prospective jurors if they were acquainted with any State witnesses, juror 32 did not respond, and he was accepted for the jury, (2) on the second day of trial, Lar moved to excuse juror 32 after his counsel saw this juror greet State witness McKnight in the hallway, and (3) counsel questioned juror 32, who explained that he did not know McKnight well ("the boyfriend of a former girlfriend of [juror 32's] stepson"[19]), had not spoken to him in over six months, would not be influenced by this acquaintance, had not known McKnight's last name to respond during voir dire, and would not give McKnight's testimony more weight than the other witnesses Satisfied that this juror was unbiased, the trial court denied Lar's motion to excuse him

But Lar does not contend that juror 32 committed misconduct in failing to disclose during voir dire that he had a passing acquaintance with McKnight or in sharing during jury deliberations any personal views about the witness's credibility Nor does Lar claim that juror 32 was biased against him or that juror 32 intentionally disobeyed the trial court's instructions not to speak to witnesses On the contrary, the record shows that juror 32 did not realize that his stepson's former girlfriend's boyfriend, whose surname (McKnight) he did not know, was a

[19] VRP (March 25, 2010) at 57

State witness during voir dire or when juror 32 greeted him in the hallway on the second day of trial because McKnight did not testify as a State witness until the *third* day of trial

Lar appears to argue that, because he had two unused peremptory challenges when the jury was empanelled, (1) he could have used one challenge to excuse juror 32 during voir dire if he had known about the juror's acquaintance with McKnight, (2) the trial court deprived him of his right to exercise a peremptory challenge when it denied his motion to remove juror 32 on the second day of trial, and (3) therefore, automatic reversal is required Lar's reliance on *State v Bird*, 136 Wn App 127, 148 P 3d 1058 (2006), is misplaced *During jury selection*, the trial court miscalculated the number of Bird's remaining peremptory challenges, thereby denying him an available challenge to which he was entitled *Bird*, 136 Wn App at 131-32 Under those circumstances, our court held that the trial court's erroneous denial of a peremptory challenge left an objectionable juror on the jury, which required reversal without a showing of prejudice *Bird*, 136 Wn App at 134 The facts here differ significantly The trial court neither miscalculated Lar's peremptory challenges nor denied Lar's use of them during voir dire, rather, Lar simply did not use them all And it was not until the second day of trial that Lar moved to excuse Juror 32, allegedly to exercise an "available peremptory challenge," after the trial court found no reason to excuse him for cause and to replace him with an alternate juror Br of Appellant at 33 Contrary to RAP 10 3(a)(6), Lar cites no authority for his proposition that he is entitled to exercise peremptory challenges after the jury has been selected, sworn, and empanelled and the trial has begun Thus, we do not further address this argument

We turn instead to the question of whether the trial court abused its discretion when it found juror 32 did not exhibit any "prejudice" and could continue to try the case fairly and

impartially, and it denied Lar's motion to excuse this juror VRP (March 25, 2010) at 60 Under RCW 2 36 110, the trial court has a duty

> to excuse from further jury service any juror, who *in the opinion of the judge*, has manifested unfitness as a juror by reason of bias, prejudice . or by reason of conduct or practices incompatible with proper and efficient jury service

(Emphasis added) The trial court fulfilled this duty here Away from the other jurors, counsel questioned juror 32 about his relationship with McKnight Juror 32 testified that he had not known and, therefore, not recognized McKnight's name when the court read the witness list during voir dire, that McKnight was a "boyfriend of a former girlfriend of [his] stepson,"[20] with whom he had not spoken in over six months, and that McKnight's testimony would not have any effect on his ability to serve as a juror and cause him to give McKnight's testimony more weight than that of other witnesses The trial court found that juror 32 had not exhibited any "prejudice," that he had "answered the questions appropriately," and that there was not a "legal basis" for excluding him VRP (March 25, 2010) at 60 Deferring to the trial court's broad discretion in such findings and rulings, we find no abuse in denying Lar's motion to excuse Juror 32 during the second day of trial

III EVIDENCE

Lar next argues that the trial court erred in denying his motion to suppress evidence that police unlawfully seized after they detained, arrested, and searched him without a warrant The State responds that (1) the trial court did not abuse its discretion in denying Lar's CrR 3 6 motion

[20] VRP (March 26, 2010) at 57

as untimely under the Lewis County Local Rules, and (2) even if the trial court had ruled on the merits of Lar's motion, he would not have prevailed We agree with the State

We review for abuse of discretion a trial court's admission of evidence *State v Finch*, 137 Wn 2d 792, 810, 975 P 2d 967 (1999) A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable reasons or grounds *State v C J*, 148 Wn 2d 672, 686, 63 P 3d 765 (2003) A trial court's evidentiary error that does not result in prejudice to the defendant is not grounds for reversal *State v Bourgeois*, 133 Wn 2d 389, 403, 945 P 2d 1120 (1997) "[E]rror is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred" *State v Tharp*, 96 Wn 2d 591, 599, 637 P 2d 961 (1981) Where an error violates a constitutional mandate, we apply the more stringent "harmless error beyond a reasonable doubt" standard *State v Cunningham*, 93 Wn 2d 823, 831, 613 P 2d 1139 (1980) In addition, we can affirm the trial court on any ground the record supports *State v Costich*, 152 Wn 2d 463, 477, 98 P 3d 795 (2004)

Assuming then, without deciding, that the trial court should not have ruled Lar's motion untimely, any error was harmless because the record shows that the challenged seizure of evidence was legal Generally, warrantless searches and seizures are per se unreasonable and violate the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution, unless the State shows that an exception to the warrant requirement applies [21] Such exceptions include exigent circumstances, searches incident to a valid arrest,

[21] *State v Duncan*, 146 Wn 2d 166, 171-72, 43 P 3d 513 (2002)

inventory searches, seizure of objects in plain view, and *Terry*[22] investigative stops *State v Garvin*, 166 Wn 2d 242, 249, 207 P 3d 1266 (2009)

Under both *Terry* and Washington case law, a police officer may stop a person for investigative purposes without a warrant if the officer has reasonable suspicion that the person has been involved in criminal activity *Terry*, 392 U S at 27[23] To justify a *Terry* stop and an investigatory detention, an officer must have "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion" *Terry*, 392 U S at 21, *see also State v Kennedy*, 107 Wn 2d 1, 5, 726 P 2d 445 (1986) Articulable suspicion means "a substantial possibility that criminal conduct has occurred or is about to occur" *Kennedy*, 107 Wn 2d at 6 When evaluating the reasonableness of an investigative stop, we consider the totality of the circumstances, including the officer's training and experience, the location of the stop, and the conduct of the person detained *State v Acrey*, 148 Wn 2d 738, 747, 64 P 3d 594 (2003)

> An informant's tip may justify an investigative stop if the tip
>
> possesses sufficient indicia of reliability, *i e*, the circumstances suggest the informant's reliability or there is some corroborative observation which suggests the presence of criminal activity or that the information was obtained in a reasonable fashion

Kennedy, 107 Wn 2d at 7 Although an anonymous informant's accurate description of a vehicle alone is "not [sufficient] corroboration or indicia of reliability" for an investigative stop,[24] our

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[22] *Terry v Ohio*, 392 U S 1, 88 S Ct 1868, 20 L Ed 2d 889 (1968)

[23] *See also State v Glover*, 116 Wn 2d 509, 513, 806 P 2d 760 (1991)

[24] *State v Lesnick*, 84 Wn 2d 940, 943, 530 P 2d 243 (1975)

Supreme Court has upheld an investigative stop based on two informant tips where the officer had experience with the crime investigated and corroborated some of the informants' factual information before he conducted the stop *Kennedy*, 107 Wn 2d at 8-9 Here, as in *Kennedy*, the Centralia and Olympia police departments received telephone tips from two citizens (McKnight and Schultz), describing the same suspicious man with visible injuries who had traveled from Ronnell's house (near the Centralia credit union) to Olympia, based on these tips, the police suspected that this was the same man who had burglarized and attempted to rob the Centralia credit union with a knife and a gun earlier that day

After receiving a call from dispatch that the suspect was last seen leaving Olympia's Phoenix Inn in a white taxi with a red top, Officer Brown independently corroborated the tips Six or seven blocks from the Phoenix Inn, he saw a taxi with the same logos dispatch had described, pulled up behind the taxi, and observed, crouched in the back seat, a white male with "lightish or gray hair"[25] who matched the descriptions of the Centralia robbery suspect and the suspicious person from the Phoenix Inn At this point, Officer Brown and other Olympia and Centralia police officers had sufficient evidence to form a reasonable suspicion that the man in the taxi, Lar, had been involved in the attempted robbery to justify conducting an investigative

[25] VRP (March 26, 2010) at 135

stop[26] They also had reason to believe that he was armed and dangerous and to treat the stop as "high risk"[27] Olympia police conducted a "high risk" stop of Lar's taxi, with their weapons drawn[28]

Centralia police officers independently corroborated the citizen tips as they took note of Lar's physical characteristics, his bloody jeans and duct tape, and his probable gunshot wounds, which, taken together with the totality of circumstances, gave the officers probable cause to arrest Lar *See State v Lee*, 147 Wn App 912, 922, 199 P 3d 445 (2008), *review denied*, 166 Wn 2d 1016 (2009) (applying totality of circumstances test to *Terry* stops) After arresting Lar for the burglary and the attempted credit union robbery, they searched his person incident to

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[26] Lar relies on *State v Meckelson*, 133 Wn App 431, 135 P 3d 991 (2006), from Division Three of our court, to argue ineffective assistance of counsel Br of Appellant at 22-26 This reliance is similarly misplaced based on its distinguishing facts Unlike the officer in *Meckelson*, here, Officer Brown did not pull Lar's taxi over for a "pretextual" traffic stop or because he believed Lar might have committed some generalized crime that the police had yet to discover *Meckelson*, 133 Wn App at 436 On the contrary, the officers were pursuing this *particular* suspect for a *particular* crime, and, when they stopped Lar's taxi, they reasonably suspected that that he had committed the attempted credit union robbery in Centralia and that he was armed with a knife and a gun Consistent with *Kennedy*, the officers did not pull Lar's taxi over until Officer Brown had independently corroborated the citizens' tips

[27] The officers knew the following facts (1) A white male, approximately 6' 3" and 60 years old with gray or light-colored hair, had displayed a knife and a gun while attempting to rob a credit union in Centralia earlier in the day, (2) he had threatened to take the robbery victim hostage, (3) he had been seen wearing bloody clothing and may have been shot, (4) he had recently traveled by taxi to Olympia, where he had last been seen leaving the Phoenix Inn in a white taxi with a red top, (5) shortly after receiving the dispatch description of the taxi, Officer Brown saw a taxi matching the description six or seven blocks from the Phoenix Inn, and (6) the man Officer Brown observed in the back seat of the taxi matched the description of the robbery suspect

[28] That officers point weapons at a suspect they believe to be dangerous does not automatically convert an investigative stop to an arrest *State v Belieu*, 112 Wn 2d 587, 604, 773 P 2d 46 (1989)

arrest and seized evidence from Lar, including the blood-stained clothing and duct tape that both citizens had reported he had been carrying *State v O'Neill*, 148 Wn 2d 564, 585, 62 P 3d 489 (2003) (valid search incident to arrest if there is probable cause to arrest and an "actual custodial arrest" takes place) The police later used a court order to obtain Lar's DNA and compared it to one of the blood-stained glass shards found at the credit union

We hold that, because the initial stop, subsequent arrest, search incident to arrest, and seizure of evidence were legal, the trial court would have been justified in denying Lar's motion to suppress had it ruled on the merits Accordingly, we affirm the trial court's denial of Lar's motion to suppress on this alternative ground

IV Effective Assistance of Counsel

Lar also argues that he received ineffective assistance when his trial counsel failed to file a timely motion to suppress evidence seized after his warrantless detention and arrest and a motion to suppress the BB gun and the knife that the police found after they "coerced" his statements at the hospital Br of Appellant at 26

A Standard of Review

We review de novo ineffective assistance of counsel claims [29] To establish ineffective assistance of counsel, a defendant must show both that his counsel's performance was deficient and that this deficient performance prejudiced him *Strickland v Washington*, 466 U S 668, 687, 104 S Ct 2052, 80 L Ed 2d 674 (1984), *State v Reichenbach*, 153 Wn 2d 126, 130, 101

[29] *State v White*, 80 Wn App 406, 410, 907 P 2d 310 (1995)

P 3d 80 (2004) A defendant must meet both prongs, failure to show either prong will end our inquiry *State v Fredrick*, 45 Wn App 916, 923, 729 P 2d 56 (1986)

The threshold for deficient performance is high, a defendant must overcome "'a strong presumption that counsel's performance was reasonable '" *State v Grier*, 171 Wn.2d 17, 33, 246 P 3d 1260 (2011) (quoting *State v Kyllo*, 166 Wn 2d 856, 862, 215 P 3d 177 (2009))

> "'When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient ' Conversely, a criminal defendant can rebut the presumption of reasonable performance by demonstrating that 'there is no conceivable legitimate tactic explaining counsel's performance ' Not all strategies or tactics on the part of defense counsel are immune from attack 'The relevant question is not whether counsel's choices were strategic, but whether they were reasonable '"

Grier, 171 Wn 2d at 33-34 (citations omitted) (quoting *Kyllo*, 166 Wn 2d at 863, *State v Reichenbach*, 153 Wn 2d 126, 130, 101 P 3d 80 (2004), *Roe v Flores-Ortega*, 527 U S 470, 481, 120 S Ct 1029, 145 L Ed 2d 985 (2000))

B Failure To File Timely Motion To Suppress Evidence Seized Following Arrest

The State concedes that Lar's counsel was deficient in failing to file timely his motion to suppress the evidence flowing from Lar's warrantless detention and arrest his identity, his clothing, his statements, his DNA, the police officers' observations that Lar had probable gunshot wounds, and the BB gun and knife We accept the State's concession that counsel was deficient in failing to file the motion to suppress within the timeframe specified by the court rules Therefore, we address the second prong of the ineffective assistance test—prejudice Lar must demonstrate that, but for his counsel's deficient performance, there is a reasonable probability that the outcome of the trial would have been different *In re Pers Restraint of Pirtle*, 136 Wn 2d 467, 487, 965 P 2d 593 (1998) Because we have already held that the record

supports the seizure of evidence incident to Lar's arrest, we cannot say there is a reasonable probability that the trial court would have granted counsel's motion to suppress had he timely filed it or that the result of the trial would have been different Because Lar has not shown prejudice, his ineffective assistance of counsel claim fails

C Failure To Move To Suppress BB Gun and Knife

Lar also argues that he received ineffective assistance when his counsel failed to move to suppress the BB gun and the knife, which the police discovered by allegedly exploiting his "coerced statements" at the hospital [30] Br of Appellant at 26 Because Lar has not shown that this failure shows his counsel's performance was deficient, we disagree

The trial court suppressed all of Lar's statements to the officers at the hospital, including his statements about where he had hidden the BB gun and the knife Clerk's Papers (CP) at 62 Lar's counsel did not, however, move to suppress the BB gun and knife, which police later found and seized after learning their locations from Lar As a matter of legitimate strategy, Lar's trial counsel may have wanted the BB gun in evidence to argue in closing that it was not a real gun and, thus, not a "deadly weapon," thereby partially negating one element of Lar's first degree burglary[31] and attempted first degree robbery[32] charges, as well as the deadly weapon sentencing

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[30] The State does not address Lar's second ineffective assistance claim based on counsel's failure to move to suppress the BB gun and knife as fruits of Lar's illegal hospital interrogation

[31] RCW 9A 52 020(1) provides

> A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime (a) is *armed with a deadly weapon*, or (b) assaults any person

(Emphasis added)

enhancements[33] on all counts

Because the officers found and seized the BB gun and the knife at the same time, it appears unlikely that Lar could have moved to suppress only the knife while keeping the BB gun before the jury Moreover, Weitz had already described the knife in her testimony about Lar's robbery attempt at the credit union, and she had pointed it out for the jury when they viewed the credit union's surveillance video Consistent with his argument that the BB gun was not a "deadly weapon," defense counsel also argued in closing that the knife's blade was "less than three inches" long and, thus, it, too, was not a "deadly weapon " VRP (March 31, 2010) at 48 Because Lar has not shown the absence of a legitimate strategic reason for counsel's decision not to move to suppress the BB gun and knife, he fails to meet the deficient performance prong of his ineffective assistance of counsel claim *Grier*, 171 Wn 2d at 33, *State v McFarland*, 127 Wn 2d 322, 336, 899 P 2d 1251 (1995) Accordingly, we need not address the second, prejudice prong in holding that Lar has not shown ineffective assistance of counsel on this ground

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[32] RCW 9A 56 200(1) provides

> A person is guilty of robbery in the first degree if
> (a) In the commission of a robbery or of immediate flight therefrom, he or she
> (i) Is *armed with a deadly weapon*, or
> (ii) Displays what appears to be a firearm or other deadly weapon, or
> (iii) Inflicts bodily injury,

(Emphasis added)

[33] Former RCW 9 94A 533(4) (2009) The Legislature amended this statute in 2011, but the changes do not affect the issues in this case

V PERSISTENT OFFENDER SENTENCE

Lastly, Lar argues that the trial court erred in sentencing him to life in prison without the possibility of parole under the POAA because the State did not submit "substantial evidence" that he had two prior convictions for bank robbery [34] Br of Appellant at 35 Lar contends that Tien's testimony that he (Lar) was the defendant named on the two federal felony judgment and sentence documents was insufficient proof of his prior convictions because (1) although familiar with Lar's criminal record, Tien had not been physically present when the federal court sentenced Lar for his earlier crimes, and (2) her testimony was insufficient to prove that he was the same Michael Anthony Lar named in the documents because the State presented no fingerprint comparisons or testimony from a person who had been physically present at the sentencings for these prior convictions These arguments fail

We review de novo a sentencing court's offender score calculation and its interpretation of the POAA *State v Knippling*, 166 Wn 2d 93, 98, 206 P 3d 332 (2009), *State v Birch*, 151 Wn App 504, 515, 213 P 3d 63 (2009) To establish a defendant's criminal history for POAA and Sentencing Reform Act of 1981[35] sentencing purposes, the State must prove the existence of his prior convictions by a mere preponderance of evidence [36] Although this burden of proof

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[34] Lar does not argue that he had a Sixth Amendment right to a jury trial before the trial court sentenced him under the POAA Therefore, we do not address this issue in our opinion

[35] Ch 9 94A RCW

[36] *Knippling*, 166 Wn 2d at 100, *State v Wheeler*, 145 Wn 2d 116, 121, 34 P 3d 799 (2001) (citing *State v Thorne*, 129 Wn 2d 736, 782, 921 P 2d 514 (1996), *abrogated on other grounds by Blakely v Washington*, 542 U S 296, 124 S Ct 2531, 159 L Ed 2d 403 (2004)), *cert denied*, 535 U S 996 (2002), RCW 9 94A 500(1)

requires "some showing that the defendant before the court for sentencing and the person named in the prior conviction[s] are the same person," when the prior convictions at issue are under the same name as the defendant before the sentencing court, identity of names is sufficient proof of this requirement [37] *State v Ammons*, 105 Wn 2d 175, 190, 713 P 2d 719, 718 P 2d 796, *cert denied*, 479 U S 930 (1986)

A defendant may rebut such showing by declaring under oath that he is not the person named in the prior convictions *Ammons*, 105 Wn 2d at 190 Only then does the burden shift back to the State to prove by independent evidence—such as fingerprints, testimony from court personnel present at the prior adjudication, or institutional packets—that the defendant before the court for sentencing and the defendant named in the prior conviction are the same person *Ammons*, 105 Wn 2d at 190 If, however, a defendant files no such declaration, the identity of the names alone is sufficient to include the prior conviction in the defendant's offender score *Ammons*, 105 Wn 2d at 190, *see also State v Priest*, 147 Wn App 662, 670, 196 P 3d 763 (2008), *review denied*, 166 Wn 2d 1007 (2009)

Under the POAA, the trial court must sentence a persistent offender to life in prison without the possibility of parole *Knippling*, 166 Wn 2d at 98, RCW 9 94A 570 A "persistent offender" is someone who, at sentencing for a most serious offense conviction, has previously been convicted on two separate occasions of most serious offenses under RCW 9 94A 525 [38] A

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[37] We acknowledge that "'[t]he best evidence of a prior conviction is a certified copy of the judgment'" *State v Lopez*, 147 Wn 2d 515, 519, 55 P 3d 609 (2002) (quoting *State v Ford*, 137 Wn 2d 472, 480, 973 P 2d 452 (1999))

[38] Former RCW 9 94A 030(34)(a) (Laws OF 2009 ch 28 § 4)

"[m]ost serious offense" includes "[a]ny felony defined under any law as a class A felony or criminal solicitation of or criminal conspiracy to commit a class A felony" Former RCW 9 94A 030(29)(a) (2009) As we have just noted, the State submitted certified copies of a "Michael Anthony Lar['s]" two earlier federal judgment and sentences for two prior "most serious offense[s]"—a 1985 conviction for two counts of armed bank robbery and two 1997 convictions for armed bank robbery and bank robbery Sentencing Ex 1, 2 Lar submitted no declaration under oath that he was not the person named in these judgment and sentences Therefore, under *Ammons* and the POAA's sentencing rules, governed by the SRA,[39] the State's reliance on Lar's name to prove that he was the same Michael Anthony Lar named on the two federal judgment and sentences was sufficient proof by a preponderance of the evidence that he was the same defendant[40] We hold, therefore, that the State presented sufficient evidence of

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[39] The Washington Supreme Court has held that, under the POAA, the State must prove the existence of a defendant's prior convictions by only a preponderance of the evidence *Thorne*, 129 Wn 2d at 784 Thus, the State can use certified copies of his judgment and sentences to prove to the trial court a defendant's prior convictions, if the defendant contests his identity, the State can submit his fingerprints to prove his identity *Thorne*, 129 Wn 2d at 783

[40] Lar's reliance on *State v Hunter*, 29 Wn App 218, 627 P 2d 1339 (1981), to support his insufficiency argument fails Br of Appellant at 35-37 *Hunter* did not involve proof of prior convictions for POAA sentencing purposes, rather, it involved proof of a prior conviction as an *element of the charged crime* of attempted first degree escape, namely that Hunter had been in jail on a felony conviction at the time of his attempted escape *Hunter*, 29 Wn App at 221-22 We held that (1) where a former judgment is an *element of the substantive crime charged*, identity of the name alone in a judgment and sentence is not sufficient proof of the identity of the person charged to warrant submitting the prior conviction to the jury, and (2) the State must submit independent evidence that the defendant is the same person named on the prior conviction *Hunter*, 29 Wn App at 221-22 In contrast, for purposes of sentencing under the POAA, a defendant's prior convictions are not "elements" of any criminal offense, therefore, the State need not prove their existence beyond a reasonable doubt *Wheeler*, 145 Wn 2d at 120, *Thorne*, 129 Wn 2d at 779, 784

Lar's two prior most serious offenses and that the trial court did not err in sentencing Lar to life in prison without the possibility of parole under the POAA

We affirm Lar's convictions and sentence.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2 06 040, it is so ordered

Hunt, J

I concur

Armstrong, P J

I concur in result only

Quinn-Brintnall, J

Appendix C

Information

IN THE SUPERIOR COURT OF WASHINGTON IN AND FOR LEWIS COUNTY

STATE OF WASHINGTON, Plaintiff, vs. MICHAEL ANTHONY LAR, Defendant.	No. 10-1-00055-5 INFORMATION

COMES NOW MICHAEL GOLDEN, Prosecuting Attorney of Lewis County, State of Washington, or his deputy, and by this Information accuses the above-named defendant of violating the laws of the State of Washington as follows:

Count I
Burglary in the First Degree

On or about the 25th day of January, 2010, in the County of Lewis, State of Washington, the above-named defendant, with intent to commit a crime against a person or property therein, did enter or remain unlawfully in the building of Twin Star Credit Union, located at 1320 S Gold Street, Centralia, WA, and, in entering or while in the building or in immediate flight therefrom, the defendant or another participant in the crime was armed with a deadly weapon and/or did intentionally assault any person therein; contrary to the Revised Code of Washington 9A.52.020(1)(a) or (b).

And in the commission thereof, the defendant was armed with a deadly weapon, to wit: a knife with a 6 inch fixed blade, that being a deadly weapon as defined in RCW

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9.94A.602 and invoking the provisions of RCW 9.94A.510, and adding additional time to the presumptive sentence as provided in RCW 9.94A.533.
(MAXIMUM PENALTY–Life imprisonment and/or a $50,000.00 fine pursuant to RCW 9A.52.020(2) and RCW 9A.20.021(1)(a), plus restitution and assessments.)

JIS Code: 9A.52.020 Burglary 1

Count II

Kidnapping in the First Degree

On or about the 25th day of January, 2010, in the County of Lewis, State of Washington, the above-named defendant did intentionally abduct another person, to-wit: HOLLY WEITZ, DOB: 4/15/74, with intent to hold him or her for ransom or reward, or as a shield or hostage; and/or to facilitate the commission of any felony or flight thereafter; and/or to inflict bodily injury on him or her; and/or to inflict extreme mental distress on him or her or a third person; and/or to interfere with the performance of any governmental function; contrary to the Revised Code of Washington 9A.40.020(1) and 9A.40.010(2). And in the commission thereof, the defendant was armed with a deadly weapon, to wit: knife with 6 inch fixed-blade, that being a deadly weapon as defined in RCW 9.94A.602 and invoking the provisions of RCW 9.94A.510, and adding additional time to the presumptive sentence as provided in RCW 9.94A.533.
(MAXIMUM PENALTY–Life imprisonment and/or a $50,000 fine pursuant to RCW 9A.40.020(2) and RCW 9A.20.021(1)(a), plus restitution and assessments.)
(If the [d/r] has previously been convicted on two separate occasions of a "most serious offense" as defined by RCW 9.94A.030(28), in this state, in federal court, or elsewhere, the mandatory penalty for this offense is life imprisonment without the possibility of parole pursuant to RCW 9.94A.030(32) and 9.94A.570.)

JIS Code: 9A.40.020 Kidnapping 1

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Count III

Attempted Robbery in the First Degree

On or about the 25th day of January, 2010, in the County of Lewis, State of Washington, the above-named defendant, with intent to commit theft, did unlawfully take personal property that the defendant did not own from the person of or in the presence of Holly Weitz against such person's will, by use or threatened use of immediate force, violence, or fear of injury to said person or the property of said person or the person or property of another, and in the commission of said crime and in immediate flight therefrom, the defendant was armed with a deadly weapon and/or displayed what appeared to be a firearm or other deadly weapon and/or inflicted bodily injury upon Holly Weitz; and/or the taking occurred within and against a financial institution as defined in RCW 7.88.010 and 35.38.060, to wit: TwinStar Credit Union; contrary to the Revised Code of Washington 9A.56.200(1) and 9A.56.190. TO COMMIT THIS CRIME, the defendant, with intent to commit a specific crime, did any act which is a substantial step toward the commission of that crime; contrary to Revised Code of Washington 9A.28.020(1). And in the commission thereof, the defendant was armed with a deadly weapon, to wit: knife with 6 inch fixed-blade, that being a deadly weapon as defined in RCW 9.94A.602 and invoking the provisions of RCW 9.94A.510, and adding additional time to the presumptive sentence as provided in RCW 9.94A.533.

(MAXIMUM PENALTY–Life imprisonment and/or a $50,000 fine pursuant to RCW 9A.56.200(2) and 9A.20.021(1)(a), plus restitution and assessments.)

(If the defendant has previously been convicted on two separate occasions of a "most serious offense" as defined by RCW 9.94A.030(28), in this state, in federal court, or elsewhere, the mandatory penalty for this offense is life imprisonment without the possibility of parole pursuant to RCW 9.94A.030(32) and 9.94A.570.)

JIS Code: 9A.56.200 Robbery 1

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Underlying Charged Crime	Resulting Classification of the Crime if the Mode of Commission is:		
	Attempt	Solicitation	Conspiracy
Murder in the First Degree	Class A Felony	Class A Felony	Class A Felony
Arson in the First Degree	Class A Felony	Class B Felony	Class A Felony
Child Molestation in the First Degree; Indecent Liberties by Forcible Compulsion; Rape in the First or Second Degrees; or Rape of a Child in the First or Second Degrees.	Class A Felony	Class B Felony	Class B Felony
Other Class A Felony	Class B Felony	Class B Felony	Class B Felony
Class B Felony	Class C Felony	Class C Felony	Class C Felony
Class C Felony	Gross Misdemeanor	Gross Misdemeanor	Gross Misdemeanor
Gross Misdemeanor or Misdemeanor	Misdemeanor	Misdemeanor	Misdemeanor

DATED: January 29, 2010.

MICHAEL GOLDEN

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Prosecuting Attorney

KJELL C. WERNER, WSBA #33810
DEPUTY PROSECUTING ATTORNEY

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LEWIS COUNTY
PROSECUTING ATTORNEY
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DEFENDANT INFORMATION					
NAME: **Michael Anthony Lar**			DOB: 11/10/1952		
ADDRESS:					
CITY, STATE, ZIP: Mill Creek, WA			PHONE #(s):		
FBI #23253P3			SID# WA13944197	LEA# 10A-1414	
SEX: M	RACE: W	HGT: 602	WGT: 205	EYES: BLU	HAIR: BLN
OTHER IDENTIFYING INFORMATION					

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Appendix D

Amended Information

IN THE SUPERIOR COURT OF WASHINGTON IN AND FOR LEWIS COUNTY

STATE OF WASHINGTON, Plaintiff, vs. MICHAEL ANTHONY LAR, Defendant.	No. 10-1-00055-5 FIRST AMENDED INFORMATION

COMES NOW MICHAEL GOLDEN, Prosecuting Attorney of Lewis County, State of Washington, or his deputy, and by this Information accuses the above-named defendant of violating the laws of the State of Washington as follows:

Count I
Burglary in the First Degree

On or about the 25th day of January, 2010, in the County of Lewis, State of Washington, the above-named defendant, with intent to commit a crime against a person or property therein, did enter or remain unlawfully in the building of Twin Star Credit Union, located at 1320 S Gold Street, Centralia, WA, and, in entering or while in the building or in immediate flight therefrom, the defendant or another participant in the crime was armed with a deadly weapon and/or did intentionally assault any person therein; contrary to the Revised Code of Washington 9A.52.020(1)(a) or (b).

And in the commission thereof, the defendant was armed with a deadly weapon, to wit: a knife with a 3 inch fixed blade, that being a deadly weapon as defined in RCW

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9.94A.825 and invoking the provisions of RCW 9.94A.510, and adding additional time to the presumptive sentence as provided in RCW 9.94A.533.
(MAXIMUM PENALTY–Life imprisonment and/or a $50,000.00 fine pursuant to RCW 9A.52.020(2) and RCW 9A.20.021(1)(a), plus restitution and assessments.)
(If the defendant has previously been convicted on two separate occasions of a "most serious offense" as defined by RCW 9.94A.030(29), in this state, in federal court, or elsewhere, the mandatory penalty for this offense is life imprisonment without the possibility of parole pursuant to RCW 9.94A.030(34) and 9.94A.570.)

JIS Code: 9A.52.020 Burglary 1

Count II

Kidnapping in the First Degree

On or about the 25th day of January, 2010, in the County of Lewis, State of Washington, the above-named defendant did intentionally abduct another person, to-wit: HOLLY WEITZ, DOB: 4/15/74, with intent to hold him or her for ransom or reward, or as a shield or hostage; and/or to facilitate the commission of any felony or flight thereafter; and/or to inflict bodily injury on him or her; and/or to inflict extreme mental distress on him or her or a third person; and/or to interfere with the performance of any governmental function; contrary to the Revised Code of Washington 9A.40.020(1) and 9A.40.010(2). And in the commission thereof, the defendant was armed with a deadly weapon, to wit: knife with 3 inch fixed-blade, that being a deadly weapon as defined in RCW 9.94A.825 and invoking the provisions of RCW 9.94A.510, and adding additional time to the presumptive sentence as provided in RCW 9.94A.533.
(MAXIMUM PENALTY–Life imprisonment and/or a $50,000 fine pursuant to RCW 9A.40.020(2) and RCW 9A.20.021(1)(a), plus restitution and assessments.)
(If the defendant has previously been convicted on two separate occasions of a "most serious offense" as defined by RCW 9.94A.030(29), in this state, in federal court, or

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elsewhere, the mandatory penalty for this offense is life imprisonment without the possibility of parole pursuant to RCW 9.94A.030(34) and 9.94A.570.)

JIS Code: 9A.40.020 Kidnapping 1

Count III

Attempted Robbery in the First Degree

On or about the 25th day of January, 2010, in the County of Lewis, State of Washington, the above-named defendant, with intent to commit theft, did unlawfully take personal property that the defendant did not own from the person of or in the presence of Holly Weitz against such person's will, by use or threatened use of immediate force, violence, or fear of injury to said person or the property of said person or the person or property of another, and in the commission of said crime and in immediate flight therefrom, the defendant was armed with a deadly weapon and/or displayed what appeared to be a firearm or other deadly weapon and/or inflicted bodily injury upon Holly Weitz; and/or the taking occurred within and against a financial institution as defined in RCW 7.88.010 and 35.38.060, to wit: TwinStar Credit Union; contrary to the Revised Code of Washington 9A.56.200(1) and 9A.56.190. TO COMMIT THIS CRIME, the defendant, with intent to commit a specific crime, did any act which is a substantial step toward the commission of that crime; contrary to Revised Code of Washington 9A.28.020(1). And in the commission thereof, the defendant was armed with a deadly weapon, to wit: knife with 3 inch fixed-blade, that being a deadly weapon as defined in RCW 9.94A.825 and invoking the provisions of RCW 9.94A.510, and adding additional time to the presumptive sentence as provided in RCW 9.94A.533.
(MAXIMUM PENALTY–Life imprisonment and/or a $50,000 fine pursuant to RCW 9A.56.200(2) and 9A.20.021(1)(a), plus restitution and assessments.)

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(If the defendant has previously been convicted on two separate occasions of a "most serious offense" as defined by RCW 9.94A.030(29), in this state, in federal court, or elsewhere, the mandatory penalty for this offense is life imprisonment without the possibility of parole pursuant to RCW 9.94A.030(34) and 9.94A.570.)

JIS Code: 9A.56.200 Robbery 1

DATED: January 29, 2010.

MICHAEL GOLDEN
Prosecuting Attorney

KJELL C. WERNER, WSBA #33810
DEPUTY PROSECUTING ATTORNEY

DEFENDANT INFORMATION					
NAME: **Michael Anthony Lar**			DOB: 11/10/1952		
ADDRESS:					
CITY, STATE, ZIP: Mill Creek, WA			PHONE #(s):		
FBI #23253P3			SID# WA13944197	LEA# 10A-1414	
SEX: M	RACE: W	HGT: 602	WGT: 205	EYES: BLU	HAIR: BLN
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Appendix E

Notice Pursuant to Persistent Offender Accountability Act (Third Strike)

SUPERIOR COURT
LEWIS COUNTY, WASH
REC'D & FILED

2010 MAR 19 AM 10: 36

KATHY BRACK, CLERK
BY [signature]
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR LEWIS COUNTY

STATE OF WASHINGTON, Plaintiff, vs. MICHAEL ANTHONY LAR, Defendant.	CAUSE NO. 10-1-00055-5 NOTICE PURSUANT TO PERSISTENT OFFENDER ACCOUNTABILITY ACT (THIRD STRIKE)

COMES NOW the State of Washington, through its Prosecuting Attorney for Lewis County, Michael Golden, by and through his Deputy Prosecuting Attorney, Kjell C. Werner, and hereby notifies the defendant that pursuant to RCW 9.94A.030 (34)(a), RCW 9.94A.570, and the Persistent Offender Accountability Act as codified in RCW 9.94A.555, and based upon the Defendant's criminal history, if the Defendant is convicted of any or all of the current charges, the Defendant is subject to a penalty of life in prison without the possibility of early release.

Dated this 19th Day of March, 2010

Kjell C. Werner, WSBA #33810
Lewis County Prosecuting Attorney

MICHAEL GOLDEN
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ORIGINAL

Appendix F

Declaration of Kjell C. Werner

DECLARATION OF KJELL C. WERNER

STATE OF WASHINGTON)
: ss.
COUNTY OF LEWIS)

Kjell C. Werner, hereby deposes and states that:

1. I am over the age of eighteen and competent to testify as to the matters contained herein;

2. I was admitted to the Washington State Bar in 2003.

3. I worked as a Deputy Prosecuting Attorney for Lewis County Washington from January 10, 2005, to January 24, 2014.

4. I am the Deputy Prosecuting Attorney who prosecuted Michael Anthony Lar in Lewis County Superior Case Number 10-1-00055-5.

5. I handled all the plea negotiations for Mr. Lar's case.

6. Donald Blair, Mr. Lar's court appointed attorney, told me that Mr. Lar would plead guilty as charged if I would agree to recommend a standard range sentence.

7. Because of Mr. Lar's prior criminal history, which included convictions for what would be strike offenses under Washington State Law, I felt it appropriate that he be sentenced to life in prison without the possibility of early release if I could prove up his priors.

8. Mr. Lar's prior convictions were from when he was prosecuted in Federal Court under the Bank Robbery and Armed Bank Robbery statutes.

9. Since I did not know whether the Judgment and Sentences from Mr. Lar's United States District Court Cases would even be available, or whether the federal statutes would be legally or factually comparable to Robbery in the First Degree under Washington State law, I wanted to at least attempt to obtain those documents before considering whether to offer any sort of plea recommendation.

8. After I managed to procure the Judgment and Sentences from Mr. Lar's prior Federal Court cases, I examined the elements of the offenses for which he had been convicted, and the facts contained the indictments.

9. Once having examined the Judgments and Sentences from Mr. Lar's prior convictions, I felt the crimes he was convicted of having committed were, if

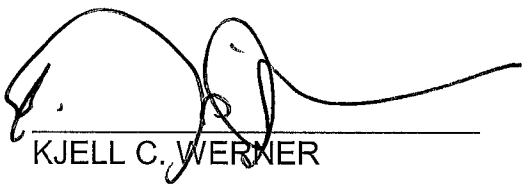
nothing else, factually comparable to the elements required to prove Robbery in the First Degree under Washington State law.

10. It was at that time I decided to file a notice stating I would seek to have Mr. Lar sentenced under the Persistent Offender Accountability Act.

9. Because of Mr. Lar's prior criminal history, which contained convictions for what I believed to be strike offenses under Washington State law, and especially given the specific facts of what he was alleged to have done in this case, I did not feel it was appropriate to offer a plea recommendation within the standard range.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

SIGNED AND DATED this 8 day of May, 2014, at Tumwater, Washington.



KJELL C. WERNER

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

In re the Personal Restraint Petition of: MICHAEL ANTHONY LAR, Petitioner.	No. 45365-7-II DECLARATION OF SERVICE

Ms. Teri Bryant, paralegal for Sara I. Beigh, Senior Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On May 9, 2014, the petitioner was served with a copy of the **Response to Personal Restraint Petition** by email via the COA electronic filing portal to Jeffrey Erwin Ellis, attorney for petitioner, at the following email address: Jeffreyerwinellis@gmail.com.

DATED this 9th day of May, 2014, at Chehalis, Washington.

Teri Bryant

Teri Bryant, Paralegal
Lewis County Prosecuting Attorney Office

LEWIS COUNTY PROSECUTOR

May 09, 2014 - 3:15 PM

Transmittal Letter

Document Uploaded: prp2-453657-Response.pdf

Case Name:

Court of Appeals Case Number: 45365-7

Is this a Personal Restraint Petition? ■ Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: ____

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

■ Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Teresa L Bryant - Email: teri.bryant@lewiscountywa.gov

A copy of this document has been emailed to the following addresses:

jeffreyerwinellis@gmail.com